Central Law Journal.

ST. LOUIS, MO., FEBRUARY 7, 1908.

SOMETHING OF INTEREST WITH REGARD TO THE REMEDY BY INTERPLEADER.

The remedy by interpleader was not much in vogue at common law. In equity we find the following definition in Cyc., Vol. 23, page 3: "A bill of interpleader is a bill exhibited where two or more persons severally claim the same debt, duty or thing from the complainant under different titles or in separate interests; and he, not claiming any interest therein himself, and not knowing which of the defendants he ought of right to render the debt or duty, or deliver the property, is either molested by an action brought against him, or fears he may suffer injury from their conflicting claims, and therefore prays that they may be compelled to interplead, and state their several claims so that the court may adjudge to whom the matter or thing in controversy belongs. The position of the interpleader must be one of absolute indifference between the parties summoned to interplead among themselves."

All the above is trite enough. The question this article is directed to is one that does not seem to have been definitely settled by any of the cases so far as we have been able to discover by a diligent search. That is to say, what is the rule of law where two parties, claiming the same fund in the hands of the interpleader or plaintiff in the case, have other matters arising out of the same transaction unsettled between them, and the whole transaction must be gone into in order to determine the rights as to the particular fund which the plaintiff has brought into court to set the defendant or defendants to fighting about. In other words, does the mere fact that they have been brought into court by an interpleader put them in a different relationship to each other than they would have been had one of them brought suit by ordinary summons to determine their dispute, and this is the question upon which the authorities are unsatisfactory.

Now, when the plaintiff files his interpleader, if his statement of the claims is unsatisfactory either or all of the defendants may deny the facts stated and cause the dismissal of the interpleader, but if the respective claims may yet be satisfactorily stated the plaintiff may be dismissed, thus leaving only the contestants for the fund in court. Now, under ordinary process, one party is party plaintiff and the other defendant. An interpleader is a proceeding in equity. Why, then, should not the court require one party to become party plaintiff and the other defendant. We find authority for such proceeding. In the case of Kertland v. Moore, 40 N. J. Eq. 106, Van Fleet, Vice Chancellor, says, touching the case as among the defendants: "The court may then adopt such course as may seem best suited to the nature of the case," citing Angell v. Hadden, 16 Ves. Jr. 202. The above was taken from the case of Northern Pac. Lumber Co. v. Lang, 28 Oregon, 246, 52 Am. St. Rep. l. c. 784. Further on, the court by Wolverton, Justice, says: "So it appears competent, for the purpose of determining the issues as between and among the defendants, for the court to adopt any course, or method of pleading which may seem appropriate or best suited for raising the issues, and when once raised it will pursue the prevailing equitable practice in trying them." "The law is made for practical uses and listens to no metaphysical subtleties, and will not, upon any terms, consent to regard that as right which every sound heart feels to be wrong," says Justice Jerry Black; and so it must appear to every "sound heart" that if two parties are brought into a court of equity by an interpleader they may join issues in identically the same way as though one of them was brought in by summons to try the same question, and this is particularly true where the code practice is established, and provides that in order to avoid other litigation

all matters arising out of the same transaction or connected therewith may be tried in the same action, and it is certainly fundamental that, when a court of equity takes jurisdiction for one purpose it will retain it to do complete justice.

There is no reason why this rule should not apply where parties have joined issue about a matter where they have been brought into a court of equity by an interpleader. They are in court to settle a dispute about a fund which is merely a part of a transaction which involves many other matters in dispute arising out of the identical transaction which gave rise to the matter they are compelled to settle by the interpleader; equity does nothing by halves, so on principle it would be as important to settle all the disputes between the parties, in such a case as in any other, and this would be particularly true where the whole transaction would be required to be considered in order to determine the rights of the parties as to the disputed fund. No valid reason may be given to the contrary. It is said in Maclennan on Interpleader, 181: "Other questions than the trial of a bare issue may be directed, such as the validity of an execution creditor's judgment against creditors generally, and that it shall be open to an attaching creditor to show that the plaintiff's judgment is void through fraud, or as being a preference." Leech v. Williamson, 10 Ont. Pr. 226. Also that "one party to the issue may be ordered to make certain admissions at the trial, in order that the rightful claimant may not be defeated by the absence of some link in the chain of formal proof. Pooley v. Goodwin, 5 N. & M. 466; 1 H. & W. 567.

It has been said in some cases that only the matter brought in by the interpleader may be contested, but it was mere dictum. Of course, as far as the plaintiff filing the interplea is concerned, this is true; he has brought the parties into court to get rid of all responsibility, and when he is discharged, it is no matter of concern to him what matters the contestants may afterwards bring in in order to settle their dispute. If they are properly in court to settle one part of an entire transaction the court would equitably, in order to prevent the taking up of time of the court, which other parts of the same transaction would otherwise require, settle the whole matter connected with that about which the interpleader is concerned. So it appears plain that when a court of equity has discharged the plaintiff in the interpleader, and put the parties to proof of their claim in the fund, the rules which apply to equity practice ought to govern the contestants.

NOTES OF IMPORTANT DECISIONS.

MARRIAGE—RELIEF FROM VOID OR FRAUDULENT MARRIAGE.—While a marriage contracted fraudulently or by deception as where one party to the contract impersonates another person, is void and constitutes no marriage in law, nevertheless in equity the chancellor will recognize certain rights which a person so defrauded may have in the premises and which are being violated or are in danger of being violated, as where the other party publishes the fact of the marriage and in other ways annoys the party so deceived. Where such a right is proven and its violation proven, the chancellor is able to shape a decree which may be as effective a remedy as the particular case may demand.

We called attention to this extension of equity jurisdiction in our comments upon the great New Jersey case of Vanderbilt v. Mitchell, 65 Cent. L. J. 35. The same question was before the Supreme Court of New York (trial term) in the recent case of Randazzo v. Roppolo, 105 N. Y. Supp. 481, where the court held that where defendant went through the form of a marriage ceremony with a man impersonating plaintiff, plaintiff, though not entitled to an annulment of the certificate of marriage filed with the bureau of vital statistics, nor to an annulment of the marriage, was entitled to a judicial determination that he was not at the time and place stated in the certificate married to defendant, and to an injunction restraining her from claiming to be his wife.

The full extent to which a decree in such a case can offer relief is illustrated in the concise, but instructive opinion by Judge Maddox as follows: "In this case a base fraud has been attempted by the woman defendant, Francesca Roppolo, against the plaintiff, and he seeks to

be relieved from the possible consequences thereof. He and the woman defendant, it appears, had been acquainted, and she commenced an action against him to recover damages because of an alleged breach of promise of marriage. Thereafter, with a man whose name does not appear, but who was not the plaintiff, she went through the form of a marriage ceremony; the man personating the plaintiff, giving the plaintiff's name and other facts in attempting to identify himself as the plaintiff. It appears that the woman gave the man $10 for so doing, and thereafter the priest performing such marriage ceremony filed his certificate thereof with the bureau of vital statistics, and thereupon the woman obtained a transcript of such record and caused the same to be lodged and filed with the authorities in the province of plaintiff's birth in Italy. The only purpose, as against plaintiff, for so doing, would seemingly be that the woman might claim at some time in the future to be plaintiff's wife, or his widow after his death. This should not be permitted, and since the marriage, as between the woman and the man so impersonating the plaintiff, is illegal, the certificate as filed should not be annulled; but she should not be allowed at any time to pose as or to claim to be plaintiff's wife, or as his widow in the event of his death, or to succeed to any right in either event. There was no marriage as between plaintiff and the woman defendant, and hence there can be no annulment; but he is within his rights under his prayer for judgment in seeking to have it judicially determined that he was not at the time and place stated in the alleged certificate married to her, that she be restrained and enjoined from posing as or claiming by reason of such certificate that she is his wife, and, further, that a note be indorsed upon the margin of such original certificate calling attention to the decree to be entered herein."

THE CONSTITUTIONALITY OF STATUTES AUTHORIZING SUBSERVICE OF PROCESS UPON CORPORATIONS.

Accurately speaking, all actual service upon corporations must be substituted; there can be no personal service, in the ordinary sense of that term, as their personality has no existence excepting as a legal fiction. We shall, however, regard the service authorized by common law, viz., service upon the principal officer within the jurisdiction as personal service, and consider as substituted service such as is made upon inferior agents of the corporation. By constructive service we mean, service by some form of publication without direct notice to any representative of the corporation. We will hereafter see that there is reason for regarding the validity of a statute providing for certain forms of service as dependent upon whether or not it is limited in its application to corporations consenting to its terms; and we will also see that most of the statutes providing for service upon foreign corporations apply only to corporations doing business in the state, and that the doing of business is construed as consenting to be served in accordance with the statutes. But the constitutionality of these statutes has usually been discussed with little reference to this consideration, and as if it were to be tested by the principles that would govern were there no implied proviso as to consent. Hence we find that the constitutionality of statutes authorizing service upon foreign corporations has been discussed from practically the same standpoint as the constitutionality of those relating to domestic corporations. We will, therefore, without regard to other considerations discuss, first:

Constitutionality as Depending on Notice —(a)—Decisions of State Courts.—The Fourteenth Amendment of the United States Constitution provides that "no state shall deprive any person of life, liberty or property without due process of law," and it is well settled that a corporation, foreign as well as domestic, is "a person" within the meaning of this clause of the constitution.[1] Our inquiry is, therefore, whether the Fourteenth Amendment annuls statutes

(1) Sam Mates County v. Ry. Co., 13 Fed. Rep. 722; Pembina, etc., Mining Co. v. Pennsylvania, 125 U. S. 180, 31 L. Ed. 650; Santa Clara Co. v. Southern Pac. R. Co., 118 U. S. 394, 30 L. Ed. 118, 24 Am. & Eng. Ry. Cas. 523; Minneapolis, etc., Ry. Co. v. Beckwith, 129 U. S. 26, 32 L. Ed. 585; 1 Cook Cor. 4th Ed., sec. 15a; Smith v. Ames, 169 U. S. 466, 42 L. Ed. 819; Charlotte, C. & A. Ry. v. Gibbes, 142 U. S. 386, 35 L. Ed. 1051; Gulf of Colorado & Santa Fe Ry. v. Ellis, 165 U. S. 150, 41 L. Ed. 666; Pinney v. Providence, L. & I. Co. (Wis.), 82 N. W. Rep. 308, 50 Cent. L. J. 343; State v. St. Marys, etc., Petroleum Co., 61 Cent. L. J. 468; Covington & L. Turnpike Road Co. v. Sandford, 164 U. S. 578, 41 L. Ed. 560; Blake v. McClung, 172 U. S. 240, 43 L. Ed. 432.

which provide for the commencement of suits against corporations, by serving any inferior agent of the company. Obviously, if such service is unconstitutional, it is because it cannot, under the law, be presumed a sufficient notice to the corporation that suit has been commenced against it. "Due process of law" always includes notice as an essential element.[2] As was said in Pinney v. Providence Loan & Investment Co.:[3] "The clause in question means, therefore, that there can be no proceedings against life, liberty, or property which may result in the deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights.[4] The important thing in all ordinary actions, and especially in a case like this, is that before a person shall be deprived of his property by legal proceedings, he shall have actual or constructive notice and an opportunity to be heard." And again in Hiller v. Burlington & M. River Co.:[5] "As the object of all service of process is to give notice to the party that he may be aware of, and resist what is sought of him, it is a general rule that any service must be deemed sufficient which makes it reasonably certain that the party served will be apprised of what is going on against him, and have a fair opportunity to defend. And ..... a state may lawfully, by statute, provide for any service of process ..... provided the mode prescribed be such as, according to common experience, is reasonably calculated, according to the circumstances of the case, fully to apprise the defendant and give it an opportunity to defend so as not to be challenged as a denial of the constitutional right to due process of law."[6]

Will it be presumed that, in serving any inferior agent, the corporation itself is given notice of suit and an opportunity to defend? Or is a statute authorizing such service inhibited by the constitution? No such service was sustainable at common law. By the common law, a corporation could only be sued by serving the chief officer within the jurisdiction of the court;[7] the theory being, that personal notice to some one responsible for the management of the corporate affairs was essential to validate the service. By statute, however, it is very generally provided that service may be made upon agents of the corporation who are not officers,[8] and the constitutionality of these statutes is not doubtful so long as the agents specified have a controlling authority over the affairs of the corporation or some of its departments;[9] it being a rea-

(2) Cases cited in note (1) also note to Pinney v. Providence L. & I. Co., 50 L. R. A. 581, citing Louisville & N. R. Co. v. Nash, 118 Ala. 477, 41 L. R. A. 331; Arnold v. Kohn, 67 Cal. 472, 8 Pac. 36; Anderson v. Goff, 72 Cal. 65, 13 Pac. Rep. 73; Denny v. Ashby, 12 Colo. 165, 20 Pac. Rep. 331; Cloyd v. Trotter, 118 Ill. 391, 9 N. E. Rep. 507; Bickerdike v. Allen, 157 Ill. 95, 29 L. R. A. 782; Hakes v. Shupe, 27 Ia. 465; Lutz v. Kelly, 47 Ia. 307; Laughlin v. Louisiana & N. O. Ice Co., 35 La. Ann. 1184; Hobson v. Peak, 44 La. Ann. 383, 10 So. Rep. 762; Elliot v. McCormick, 144 Mass. 10, 10 N .E. Rep. 705; Martin v. Kittridge, 144 Mass. 13, 10 N. E. Rep. 710; Needham v. Thayer, 147 Mass. 536, 18 N. E. Rep. 429; Lydiard v. Chute, 45 Minn. 277, 47 N. W. Rep. 967; Beyer v. Continental Trust Co., 63 Mo. App. 521; Eastman v. Dearborn, 63 N. H. 364; Elmendorf v. Elmendorf, 58 N. J. Eq. 113, 44 Atl. Rep. 164; Bartlett v. Spicer, 75 N. Y. 528; McKinney v. Colline, 88 N. Y. 217; Winfree v. Bagley, 102 N. C. 515; Willamette, etc., Co. v. Hendrix, 28 Ore. 485, 42 Pac. Rep. 514; Pepper v. Shearer, 48 S. C. 492; Scott v. Streepy, 73 Tex. 547; Barrow S. S. Co. v. Kane, 170 U. S. 100, 42 L. Ed. 964.

(3) 82 N. W. Rep. 308, 50 Cent. L. J. 343, 50 L. R. A. 577.

(4) Hagar v. Reclamation Dist., 111 U. S. 708, 28 L. Ed. 569.

(5) 70 N. Y. 223.

(6) Similar language is used by the Supreme Court of the United States in Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 576.

(7) Cook Cor., 4th Ed. 752; Kansas City, etc., R. R. v. Daughtry, 138 U. S. 298, 34 L. Ed. 963; Young v. Dexter, 18 Fed. Rep. 210; Beardsley v. Johnson, 121 N. Y. 224; Gaskell v. Chambers, 26 Beav. 252; Conn. etc., Co., v. Frost, 15 Colo. 310.

(8) Smith v. Chicago, etc., Ry. Co., 60 Ia. 512; Schlengener v. Chicago, etc., R. Co., 61 Ia. 235; Central R. Co. v. Smith, 69 Ga. 268; Ex Parte St Louis, etc., R. Co., 40 Ark. 141, 16 Am. & Eng. R. Cases, 547; Missouri Pac. R. Co. v. Collier, 62 Tex. 318, 18 Am. & Eng. R. Cases, 218; Hudson v. St. Louis, etc., R. Co., 53 Mo. 525; East Tennessee, etc., R. Co. v. Bayliss, 74 Ala. 130, 19 Am. Eng. Ry. Cases, 150; Missouri, etc., Ry. Co. v. Crowe, 9 Kan. 496; Ruthe v. Green Bay, etc., Ry. Co., 37 Wis. 344; Toledo, etc., Ry. Co. v. Owen, 43 Ind. 405; St. Louis, etc., Ry. Co. v. DeFord, 38 Kan. 299; Adams Express Co. v. St. John, 17 Ohio St. 641; Hoen v. Atlantic, etc., Ry. Co., State & Northwestern Endowment, etc., Ass'n, 62 Wis. 174.

(9) Lake Shore, etc., Ry. Co. v. Hunt, 39 Mich. 469.

sonable presumption that notice to such agents is notice to the corporation.[10] It is not so clear, however, that the same presumption is justifiable when service is authorized upon subordinate agents. In Lake Shore, etc., R. Co. v. Hunt,[11] Judge Cooley strongly suggested that it was not within the power of the legislature to authorize such service. The following is his language: "The statute (Comp. L. 6463) permits the summons on a corporation garnishee to be served on the 'president, cashier, secretary, treasurer, general, or special agent, superintendent or other principal officer.' John W. Drew is not represented to be an officer of the railroad company, but an agent. But what sort of an agent? Was he agent to buy wood, or to employ a switchman, or to keep cattle off the track, or what was his agency? Every servant of the road is, in a sense, an agent; there must be something more definite than the mere designation of a man as agent before a court can say that his relation to the corporation was such as to make him its representative for the purpose of receiving service of process for it. The terms 'general or special agent' are very indefinite, but employed as they are here in association with terms designating the principal officers of the corporations, they evidently intend agents who either generally, or in respect to some particular department of the corporate business, have a controlling authority either general or special. They do not mean every man who is entrusted with a commission or an employment. *It could hardly be pretended that the legislature had the power to make every inferior agent the agent of the company for such a purpose;* if it had, it would be a power which a prudent legislature would be careful not to exercise, and which we are confident there has been no intention to exercise in this statute." Since this decision, however, the Michigan legislature has enacted statutes providing in substance that service may be made upon any officer or agent of corporations, and subsequent decisions of the Michigan court, while not discussing the constitutionality of these statutes, show a tendency to give the broadest possible construction to the term "any agent." In Ryerson v. Wayne Circuit Judge,[12] service was made on one, Baker, a traveling salesman of a foreign corporation. Baker had no office within the state of Michigan. He had no control over any employees of the corporation. His duties were those of the ordinary traveling agent, selling goods to retail dealers. It was contended that Baker was not an agent within the meaning of the statute, and the case of Lake Shore, etc., Ry. Co. v. Hunt, (supra) in which Judge Cooley remarked that, it could hardly be pretended that the legislature had the power to make every inferior agent an agent to receive service, was cited in support of this contention. But ignoring this remark, the supreme court sustained the service upon Baker for the very reason, apparently, that in its judgment the legislature had made every inferior agent of corporations an agent to receive service of process. Moinet v. Burnham, etc., Co.,[14] decided in April, 1906, involved the construction of a statute authorizing suits against domestic corporations by serving the presiding officer, cashier, secretary or treasurer, or any other officer or agent. The officer's return showed service upon the defendant corporation, "by delivering a copy of said declaration, together with a true copy of the notice to appear and plead upon A. D. Chamberlain, who was then and there a traveling salesman, and agent of said defendant." The court said: "It is also urged that the agent upon whom the declaration in this case was served, being only a traveling salesman, is not an agent of the character contemplated by the statute. (Sec. 10468 C. L., 1897.) In Ryerson v. Wayne Circuit Judge, 114 Mich. 352, this court held that a traveling salesman was 'an agent of the corpora-

(10) Lake Shore, etc., Ry. Co. v. Hunt, 39 Mich. 469.
(11) 39 Mich. 469.
(12) 114 Mich. 352.
(14) 13 D. L. N. 38, 106 N. W. Rep. 1126.

tion' within the meaning of Act 61 of the Public Acts of 1895. (An act providing for service of process on foreign corporations.) The only distinction between that case and the case at bar is this: That the statute there involved related to a foreign corporation, while the statute involved here relates to a domestic corporation. We think this distinction of no consequence. The Ryerson case is in point and is decisive against defendant's contention now under consideration." It would thus seem that the Michigan court has construed the Michigan statutes as making inferior agents of corporations both foreign and domestic, agents for the purpose of receiving service of process for the commencement of suits, and has apparently assumed the constitutionality of such statutes without discussing it.

A statute very similar to those of Michigan, but applying only to foreign corporations, has been expressly sustained by the Supreme Court of South Carolina. The statute authorized service upon the "president, secretary, treasurer, attorney, or any agent" of foreign corporations.[15] The scope of this language was not definitely determined, but it was construed as authorizing service upon a traveling salesman sent by the corporation to investigate the controversy out of which the cause of action arose.[16] A Virginia statute required foreign corporations to appoint an agent within the state upon whom service of process might be made, and further provided that, in case any such corporation should fail to comply with this requirement, service upon any of its officers, agents or employees should be deemed a sufficient service upon the company.[17] Under this statute a bookkeeper of a foreign corporation undertook to accept service. The court assumed the validity of the statute, and that by virtue of it, service might lawfully have been made upon the bookkeeper, but held that his acceptance of service was unauthorized.[18]

(*b*) *Decisions of the United States Supreme Court.*—In Connecticut Mut. L. Ins. Co. v. Spratley,[19] the statute under consideration, provided "that process may be served upon any agent of said corporation found within the county where the suit is brought, no matter what character of person such agent may be; and in the absence of such an agent, it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time the transaction out of which the suit arises took place." The Tennessee court construed this statute as authorizing service only upon such agents as might reasonably be presumed to represent the corporation in the transaction out of which the suit grew, upholding the statute as constitutional. The Spratley case was appealed to the United States Supreme Court, and that court sustained the service without expressly passing upon the validity of the statute as a whole. The agent served with process had been sent into Tennessee to adjust a dispute between plaintiff and the corporation over a claim for life insurance. His authority was set forth in writing and was, "for special service in any matters which may be referred to you, with instructions, during the pleasure of the directors of the company and under the direction of the executive officers; to have your entire time and services, except upon leave of absence; to pay the necessary traveling and hotel expenses incurred in the line of your duty, and to pay you for your time and services at the rate of $2,500 per annum. This agreement terminable on the part of the company, at the pleasure of the directors, and on your part by thirty days' written notice." It appeared that the corporation was doing business in the state where suit was commenced. It also appeared that no-

(15) 23 Stat. at L. p. 42, Code S. C. Sec. 155.

(16) Abbeville Elect. L. & P. Co. v. Western Elect. Sup. Co., 55 L. R. A. 147.

(17) Sec. 1105, Code of Virginia.

(18) New River Mineral Company v. Seeley, 120 Fed. Rep. 198.

(19) 172 U. S. 602, 43 L. Ed. 569, Affirming 99 Tenn. 322, 44 L. R. A. 442. See also Ga. Rev. Code, 3293, Hartford v. Carruge, 41 Ga. 660.

tice of suit and a copy of the process had been sent to the vice-president of the company, at its office in Hartford, Conn. In considering the question, whether on this showing the Tennessee court had obtained jurisdiction to render judgment against the corporation, the United States Supreme Court said: "We are not called upon to decide upon the entire validity of this whole act. The federal question with which we are now concerned is, whether the court obtained jurisdiction to render judgment in the case against the company, so that to enforce it would not be taking the property of the company without due process of law. Even though we might be unprepared to say that a service of process upon 'any agent' found within the county, as provided in the statute, would be sufficient in the case of a foreign corporation; the question for us to decide is whether, upon the facts of this case, the service of process upon the person named was a sufficient service to give jurisdiction to the court over this corporation. If it were, there was due process of law, whatever we might think of the other provisions of the act in relation to the service upon any agent of a corporation, no matter what character of agent the person might be. If the person upon whom process was served in this case was a proper agent of the company, it is immaterial whether the statute of the state also permits a service to be made on some other character of agent which we might not think sufficiently representative to give the court jurisdiction over the corporation. If the service be sufficient in this instance, the corporation could not herein raise the question whether it would be sufficient in some other and different case coming under the provision of the state statute. ..... It is admitted that the person upon whom process was served was an agent of the company. Was he sufficiently representative in his character? He was sent into the state as such agent to investigate in regard to this very claim, and while there he was empowered to compromise it within certain stated terms, leaving him a certain discretion as to the amount. He was authorized to settle the claim for the amount of the reserve, 'or thereabouts.' He did not leave his character as agent when he entered the state. On the contrary, it was as agent, and for the purpose of representing the company therein that he entered the state; and as agent he was seeking a compromise of the claim by the authority of the company, and therein representing it. Why was he not such an agent as it would be proper to serve process upon? He had been appointed an agent by the company; his whole time and services were given to the company under an appointment made years previously; he received a salary from the company not dependent upon any particular service at any particular time. The company having issued policies upon the life of an individual who had died, and a claim having been made for payment in accordance with the terms of those policies, the company clothed him with authority to go into the state and, in its behalf, to investigate the facts surrounding the claim; and authority was given him to compromise it upon terms which left to him discretion to some extent as to the amount of the payment. He was not a mere agent appointed for each particular case. He was employed, generally, by the company, to act in its behalf in all cases of this kind, and as directed by the company in each case. Entering the state with this authority, and acting in this capacity, the company itself doing business within the state, it seems to us that he sufficiently represented the company within the principle which calls for the service of process upon a person who is, in reality, sufficient of a representative, to give the court jurisdiction over the company he represents. In view of all the facts, we think it a proper case in which the law would imply, from his appointment and authority, the power to receive service of process in the case which he was attending to." It would thus seem that, while the court reserved its opinion as to the constitutionality of the clause of the act provid-

ing for service upon "any agent," etc., it expressly upheld as valid the clause providing for service upon any person representing the corporation in the transaction out of which the suit arose. It would seem, however, that the provisions in the act for personal notice by mail to the corporation at its head office were regarded as important by the court, for it further says: "Taken in connection with the further fact of sending (as provided for in the statute), a copy of the process and notice thereof, by registered letter, to the home office of the company, and also the personal service upon the company of a copy of the process and notice thereof, at its home office, it must be admitted that one of the chief objects of all such kinds of service, namely, notice and knowledge on the part of the company of the commencement of suit against it, is certainly provided for. We do not intimate that mere knowledge of notice, as thus provided, would be sufficient without a service of the agent in the state where the suit was commenced, but we refer to it as a part of the facts in the case."

But in the very recent case of Chicago Board of Trade v. Hammond Elevator Co.,[20] the Supreme Court of the United States apparently went the full length required to sustain the clause of the Tennessee statute providing for service upon any agent. In this case, the court sustained a service of process under an Illinois statute providing for service upon foreign corporations, by leaving a copy of the summons with any agent of said company found in the county. The suit was a bill in chancery filed by the Chicago Board of Trade, claiming that it had a property right in quotation of prices, in transactions made within its exchange, and charging the defendant with conspiracy to steal and use their quotations. It appeared from the officer's return that the president of the corporation could not be found and that the subpœna had been served by delivering a copy of the same "to Albert M. Babb, agent for the Hammond Elevator Co. at Peoria, and by reading the same to and within the presence and hearing of John L. Dickes, a member of the firm of Battle & Dickes, agents of said company." It nowhere appears, from the report of the case, that either Babb or Battle & Dickes represented the defendant company in, or had any connection with the transactions charged in the bill as the basis of suit. The defendant moved to set aside the service on the ground that the return was untrue in fact, and insufficient in law. The trial court sustained this position and entered a decree dismissing the bill. The defendant had taken great pains to make it appear that the relationship between itself and Babb & Dickes was not that of agency. They acted as brokers representing the defendant at Peoria, Ill., buying and selling stocks for it at that place, but the transactions were disguised so as to make it appear that they acted only as the agents of the local customers.[21] In this case, the United States Supreme Court did not discuss the constitutionality of the Illinois statute, but it is not to be supposed that the court overlooked that question, for it cites the case of Conn. Mut. Life Ins. Co. v. Spratley, (supra), in which it had recently considered the constitutionality of the Tennessee statute. In the case from Tennessee the court had, as we have seen, expressly reserved its opinion upon the validity of the clause of the statute providing for service upon "any agent." But it was under this clause of the Illinois statute that service had been made in the case from that state. Hence, in sustaining the service, the United States Supreme Court must have sustained the act under which it was made. It is true this might have been done by finding that the words "any agent," as used in the statute, had a restricted meaning, and did not include every person entrusted by the company "with a commission or employment," but included only such agents

(20) 198 U. S. 425, 49 L. Ed. 1112.

(21) This case illustrates the means by which some corporations attempt to gain an undue advantage over those with whom they deal, by rendering it impossible for the latter to sue them, except in the state where they were organized.

as "might reasonably be presumed to represent the corporation in the transaction out of which the suit grew." But the opinion contains nothing to suggest that the words "any agent" were regarded by the court as having a more limited application in the Illinois statute than in that of the Tennessee where the intention of the legislature to give them the broadest possible application was emphasized by the addition of the clause "no matter what character of agent such person may be." Nor does it appear that the agents served represented the company in the transaction out of which the suit grew. In an earlier case[22] service under a Missouri statute was sustained, although the statute provided that service might be made on any agent or employee of a foreign corporation doing business in the state. The constitutionality of the statute was not questioned probably for the reason that the validity of the clause permitting service on any employee was not involved, the service in question having been made on a station agent, and was, therefore, within that clause of the statute providing for service upon any agent in charge of any office of the corporation. In Mexican Central R. Co. v. Pinkney[23] it appears that the Texas statute provided for service upon "any local agent" of a foreign corporation. Here also it would seem that the validity of the statute was assumed for the sufficiency of the service was made to hinge upon the fact of agency. Lawton, upon whom service was made, was employed in a joint warehouse owned by the Rio Grande & El Paso Railroad Company. He and "the whole force of employees and agents in that warehouse were selected by that company with the approval of certain other named companies, not including the defendant." The defendant had no power to discharge him, and the only ground for contending that he was its agent was that the defendant company paid one half of the expense incurred in maintaining and operating the joint warehouse. And it was held that this did not constitute him a local agent within the meaning of the statute.[24]

Our conclusions on this branch of the subject may be stated as follows: (1) It is unquestionably competent for a state legislature to authorize service of process upon any agent who represents the corporation in the transaction which is the basis of suit,—or who represents it in any general sense, such service constituting sufficient notice to the corporation. (2) There is no decision of the United States Supreme Court holding that service upon any inferior agent, or upon a mere employee, might not meet the requirements of due process of law as to notice, and where such service is authorized only in case an officer or general agent of the corporation cannot be found there is authority for inferring that it would be regarded as giving sufficient notice. (3.) This much may be affirmed wholly irrespective of any express or implied consent to the service provided by the statute. And we shall see that what may be called the doctrine of assent has been applied, to some extent, to most of the statutes providing for service upon foreign corporations, and is apparently capable of similar application to domestic corporations. Before proceeding to this subject, however, we will consider:

Nature and Basis of State's Control Over Foreign and Domestic Corporations.—We

(22) New York L. E. & W. R. Co. v. Estill, 147 U. S. 607, 37 L. Ed. 301.

(23) 149 U. S. 197, 37 L. Ed. 700.

(24) A Texas statute authorizing service of process upon any officer or agent has apparently been held valid by the court of that state, See Southern Pac. Co. v. Denton, 146 U. S. 202, 36 L. Ed. 945. A dictum in St. Clair v. Cox, 106 U. S. 350, 27 L. Ed. 350, is to the effect that service upon a subordinate employee would not confer jurisdiction. In that case it was said: "A certificate of service of process by the proper officer on a person who is its agent there, would, in our opinion, be sufficient prima facie evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employee or to a particular transaction, or that his agency had ceased when the matter in suit arose."

have said that the state has practically the same power to regulate the mode of service upon a foreign corporation doing business within its territory as if it were a corporation of its own creation. The power to regulate a foreign corporation is included in the power which the state has to exclude it, and its power to exclude is absolute, excepting in the case of corporations engaged in interstate commerce or in the service of the federal government.[25] Having the power to exclude, it, of course follows, that the state may annex any conditions whatever to its grant to a foreign corporation of the privilege of engaging in business within the state.[26] If the corporation complains that the conditions proposed are unreasonable, the state may reply that the privilege offered of entering the state need not be accepted, but if accepted it must be accepted with the burdens proposed, however unreasonable they may seem.[27]

It is manifest that the state has a similar power over domestic corporations. They are creatures of its own creation, and in creating them it can bestow such powers as it may choose, and upon such conditions as it may choose subject only to constitutional restraints. "The right to be a state corporation depends solely upon the grace of the state, and is not a right inherent in the parties."[28] In seeking then for incorporation, the incorporators stand in much the same position as a foreign corporation when it seeks admission for the purpose of doing business in the state. Having no inherent right to the privileges they seek, they must accept them with whatever conditions they may be burdened. So in granting its franchises to a domestic corporation, the legislature may reserve the right to revoke them at pleasure;[29] and it has, without any reservation, the power to revoke its license to a foreign corporation, without assigning any cause.[30]

(25) The only limitation upon the power of the state to exclude a foreign corporation from doing business within its limits, or hiring officers for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there arises where the corporation is in the employ of the federal government or where its business is strictly commerce interstate or foreign, Pembina Conn. Silver Mining, etc., Co. v. Pennsylvania, 125 U. S. 181, 31 Fed. Rep. 650. The states may, therefore, require for the admission within their limits of the corporations of other states or any number of them, such conditions as they may choose without acting in conflict with the concluding provisions of the first section of the Fourteenth Amendment. See also Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 38 L. Ed. 871; Waters Pierce Oil Co. v. Texas, 177 U. S. 27 44 L. Ed. 657. "It must be regarded as finally settled by the frequent decisions of this court that subject to certain limitations as respects interstate and foreign commerce a state may impose such conditions, upon permitting a foreign corporation to do business within its limits, as it may judge expedient." People v. Roberts, 171 U. S. 661, 43 L. Ed. 324. See also Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1, 24 L. Ed. 708; Telegraph Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067; See also note to Kindel v. Beck (Colo.), 24 L. R. A. 311.

(26) See cases cited in note 25.

(27) Speaking of foreign corporations, the U. S. Supreme Court in Paul v. Virginia, 75 U. S. 168, 19 L. Ed. 357, said: "The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states, a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their consent, it follows, as a matter of course, that such consent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporations entirely, they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests. The whole matter rests in their discretion." The state has the right to exclude such corporations from its territory, or having given a license to revoke it in its discretion for good cause or without cause. The motive or intention of the state in so doing is not open to inquiry. Doyle v. Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148.

(28) Mr. Justice White in Ashley v. Ryan, 153 U. S. 441, 38 L. Ed. 773; Covington & L. Turnpike Road Co. v. Sandford, 164 U. S. 578, 41 L. Ed. 560.

(29) Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. Ed. 182. But it cannot revoke its grant without such reservation, Dartmouth College Case, 4 Wheaton, 518. Reserved power to alter, amend, or repeal charters. See Greenwood v. Union Freight R. Co., 105 U. S. 13, 26 L. Ed. 961, and cases cited.

(30) Doyle v. Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148. But a contract relation may arise between the state and the foreign corporation, and when it has a contracted right to do business, in the state, the latter cannot revoke that right. N. Y. L. E. & W. R. Co. v. Commonwealth of Pennsylvania, 153 U. S. 646, 38 L. Ed. 853.

And here we come upon the broad and fundamental distinction between the legal status of a corporation and that of a natural person. The legal existence of the former is created by the state, and may be at any time extinguished by the state.[31] This peculiar power of the state over corporations has given rise to certain legal anomalies of great practical importance. Thus many of the states, in granting license to foreign corporations to do business, have provided for a revocation of the license in case the corporation should remove any suit commenced against it to the federal courts.[32] Such a provision is wholly unconstitutional, and the courts will declare it to be of no force as an executory agreement.[33] At the same time the executive officers can compel the corporation to submit to it or forfeit its license to continue business in the state.[34] And so it would seeem that in providing for the incorporation of its own citizens, a state might reserve the absolute right to repeal its grant of incorporation, and declare that it would so repeal it in case the corporation should at any time invoke the jurisdiction of a federal court. No legislature is likely to adopt any such policy in dealing with its corporations, for circumstances are not likely to arise that would make such a policy wise or justifiable. But that such action would be within the power of the legislature seems almost necessarily to follow from the decision in Doyle v. Ins. Co., and indeed from the very nature of a corporation as the creature of legislation. That this power could be used with tremendous effect by the united action of the several states of the Union, and indeed by the separate action of any one of them, must be manifest. Without the expense and uncertainty incident to judicial proceedings, the executive and legislative departments of government can apply to corporations, the most effective, coercive measure that can be vested in any sovereign. The sanctions by which the law ordinarily induces adherence to the terms of a contract, consist in the power to award damages for its breach or to compel its specific performance, and the application of these sanctions is usually

(31) We must here guard against a misapprehension. Although the state may reserve the right to repeal at any time the law under which a corporation is organized, and thus extinguish the corporation as a legal entity, the state is, nevertheless, as much subject to constitutional restraints in dealing with the property of the corporation, or with any vested right to property, as in the case of its dealings with natural persons. As was said by Mr. Justice Field: "The object of the reservation . . . was to preserve to the state, control over the corporate franchises, rights and privileges which, in her sovereign or legislative capacity, she had called into existence. In other words, to enable her to annul or modify that which she had created. It was not its object to interfere with the contracts which the corporation, when once created, might make, nor with the property which it might acquire."

(32) Statutes containing provisions of this character have been enacted by Illinois, Chapt. 73, Hurds Revised Stat. Title Insurance. See Cable v. U. S. Ins. Co., 191 U. S. 304, 48 L. Ed. 193; Texas Gen. Laws, 1887, p. 116, 117. See Southern Pac. Co. v. Denton, 146 U. S. 202, 36 L. Ed. 945, Iowa Chap. 76 Laws of 21st Gen. Assembly, Secs. 1, 2, 3 and 4; See Barron v. Burnside, 121 U. S. 186, 30 L. Ed. 917, Wis. Sec. 22, Chapt. 56, Laws of Wis. 1870; See Doyle v. Ins. Co., 94 U. S. 535, 24 L. Ed. 150; Kentucky Stat. 1903, Sec. 631-4. See Prewitt v. Ins. Co., 1 L. R. A. (N. S.) 1021. Travellers Ins. Co. v. Prewitt, 26 Sup. Ct. Rep. 619.

(33) See cases cited in note 32.

(34) In Doyle v. Ins. Co. 94 U. S. 535, 24 L. Ed. 152, it was said: "The statute of Wisconsin declares that if a foreign insurance company shall remove any case from its state courts into the federal courts, contrary to the provision of the act of 1870, it shall be the duty of the Secretary of State immediately to cancel its li- state has the power to cancel the license, it has the power to judge of the cases in which the cancellation shall be made. It has the power to determine for what causes and in what manner the revocation shall be made. It is said that we thus indirectly sanction what we condemn when presented directly, to-wit: that we enable the State of Wisconsin to enforce an agreement to abstain from the federal courts. This is an inexact statement. The effect of our decision in this respect is that the state may compel the foreign company to abstain from the federal courts or to cease to do business in the state. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that state. That state has authority at any time to declare that it shall not transact business there. This is the whole point of the case and, without reference to the injustice, the prejudice, the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or constitution of the United States, by its exclusion from the state, is infringed; and this is what the state now accomplishes. There is nothing, therefore, that will justify the interference of this court." To same effect is Prewitt v. Ins. Co., 1 L. R. A. (N. S.) 1021; Travellers Ins. Co. v. Prewitt, 25 Sup. Ct. Rep. 619.

preceded by litigation, more or less protracted. But without the incenveniences of trial, a foreign corporation that disregards any obligation (whether constitutional or not) imposed upon it by a state, may have its legal existence within that state summarily blotted out. And it would seem that a domestic corporation may be dealt with in very much the same manner.

This branch of our subject is so interesting that it tempts a digression, from the main topic, greater than would be warranted. The purpose at present is to point out that the state may invoke not only all its constitutional powers, but what may be called super-constitutional powers in providing for and compelling submission to service of process upon corporations. Suppose the state provides a form of service which does not meet the requirements of "due process of law." It enacts that foreign corporations must submit to this form of service, making their license to continue business in the state dependent upon their submission.—Similarly with domestic corporations.—If their franchises be granted upon express condition that they submit to an unconstitutional form of service, and the right to repeal the grant be reserved absolutely, what foreign corporation having a profitable business, or what domestic corporation whose franchises are valuable will dare assert its constitutional rights? Thus we see the radical difference between the power which the state can exercise over corporations, and that which it can exercise over natural persons.

Foreign Corporations—Inability to Migrate—Assent to Form of Service.—We have seen that proceedings under statutes authorizing service upon "any agent" have been sustained; the constitutionality of the statutes being either assumed or expressly affirmed. But these statutes only related to corporations "doing business within the state." As to them the uniform test of validity was the sufficiency of the service provided for to raise a presumption of notice to the responsible officers or agents of the corporation. But when we come to inquire as to service upon foreign corporations not doing business in the state we will see that, while service in such form as to raise a reasonable presumption of notice is, where there is no express or implied consent, essential to constitute due process of law, it does not follow that the requirements of due process are fulfilled by every form of service, which suffices to raise that presumption. Service upon the president of a foreign corporation would certainly give notice of the suit, yet a statute authorizing such service as the basis of a personal judgment against foreign corporations not doing business in the state is unconstitutional.[35] The insufficiency of such service does not arise from any insufficiency of notice, but from the theory that a foreign corporation cannot be found, save within the territorial limits of the state where it was chartered.[36] Although one or more of its officer may reside within the jurisdiction, yet if the corporation itself be organized under the laws of another state, service upon the officers or agents is of no effect unless the corporation be engaged in business in the state where they are served.[37]

The common law theory was that a corporation couldn't migrate[38] and could not be found in the person of its officers or agents outside the territorial limits of the state that created it, and consequently could not be sued, save in that state, unless by proceedings against its property.[39] This anci-

(35) 2 Cook Corp. 759; Goldey v. Morning News, 156 U. S. 519, 39 L. Ed. 517; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Blake v. McClung, 172 U. S. 239, 43 L. Ed. 432; St. Clair v. Cox, 106 U. S. 350, 27 L. Ed. 222; Conn. Mut. L. Ins. Co. v. Spratley, 172 U. S. 615, 43 L. Ed. 573.

(36) St. Clair v. Cox, 106 U. S. 352, 27 L. Ed. 222; Ex Parte Schollenberger, 96 U. S. 370, 24 L. Ed. 853; Conn. Mut. L. Ins. Co. v. Spratley, 172 U. S. 615, 43 L. Ed. 573.

(37) See cases cited in last note, also Foster v. Betcher Lumber Co., 23 L. R. A. 493, and cases in note.

(38) Bank of Augusta v. Earle, 13 Pet. 518, 10 L. Ed. 274.

(39) Foster v. Charles Betcher L. Co., 23 L. R. A. 493, and note citing: McQueen v. Middletown Mfg. Co., 16 Johns, 5; Robb v. Chicago & A. R. Co., 47 Mo. 540; Middledough v. St. Joseph & D. C. R. Co., 51 Mo. 520; Kain v. Morris Canal & Bkg. Co., 14 Conn. 303; Middlebrooks v. Springfield F. Ins. Co., 14 Conn. 301; Hulbert v.

ent doctrine has been modified to the extent of permitting suits for personal judgment wherever the corporation is doing business.[40] The history of this modification is interesting. It was permitted on the theory that the corporation, when it entered the state to do business, must be deemed to assent to the only form of service practicable, that is, to service upon the agent through which it transacted its business within the state.[41] It is hardly correct to say that the doctrine as to the inability of a corporation to migrate was modified. It was rather the doctrine regarding service of process that was modified. A foreign corporation was and still is recognized as a non-resident in all states save that of its organization.[42] The doctrine that a personal judgment against a non-resident can be obtained only by personal service within the jurisdiction has in recent years been established more firmly than ever.[43] It follows,

Hope Mut. Ins. Co., 4 How. Pr. 275; Nash v. Evangelical Lutheran Church, 1 Miles (Pa.), 78; Andrews v. Michigan Cent. R. Co., 99 Mass. 534, 97 Am. Dec. 51; Desper v. Continental Water Meter Co., 137 Mass. 252; Lewis v. Northern Railroad, 139 Mass. 294; McQueen v. Middletown Mfg. Co., 16 Johns, 6; St. Clair v. Cox, 106 U. S. 350, 27 L. Ed. 222.

(40) It has been held that no special statutory provision is necessary to authorize service of process upon the agent or officer who represents the corporation in its local business. Diana v. Virginia F. & M. Ins. Co., 13 Rep. 457; Van Dresser v. Oregon, R. & N. Co., 48 Fed. Rep. 202; Havden v. Androscoggin Mills, 1 Fed. Rep. 93; North Missouri R. Co. v. Akers, 4 Kan. 453, 16 Am. Dec. 183; Norton v. Berlin Iron Bridge Co., 51 N. J. L. 442; National Condensed Milk Co. v. Brandenburgh, 40 N. J. L. 111; Farnsworth v. Terre Haute A. & St. L. R. Co., 29 Mo. 75; Bawknight v. Liverpool, L. & G. Ins. Co., 55 Ga. 194.

(41) St. Clair v. Cox, 106 U. S. 360, 27 L. Ed. 222; Merchants Mfg. Co. v. Grand Trunk R. Co., 18 Fed. Rep. 358; In B. and O. R. R. Co. v. Harris, 79 U. S. 65, 20 L. Ed. 354, it was said: "It (a corporation) cannot migrate but may exercise its authority in a foreign territory, upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented and will be bound accordingly." This language was quoted and approved in re Schollenberger, 96 U. S. 369.

(42) In Bank of Augusta v. Earle, 13 Peters, 520, 10 L. Ed. 274, it was said: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty. But, although it must live and have its sovereignty being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. It is, indeed, a mere artificial being, invisible and intangible; yet it is a person for certain purposes, in contemplation of law and has been recognized as such by the decisions of this court. It is sufficient that its existence as an artificial person, in the state of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place; and that it is permitted by the laws of that place to exercise there the powers with which it is endowed." See also Cook Corp. sec. 757, and cases cited. In Camden Roll Mill Co v. Swede Iron Co., 32 N. J. L. 15, it was said: "It is to be regarded as settled that if a foreign corporation at the time of commencement of suit, does not do business or has not any office or place of business in this state, such corporation, except by its own consent cannot be brought within the jurisdiction of this or any other court of this state. Under such circumstances the officers and agents of such foreign corporation, when they come into this jurisdiction, do not bring with them their official character or function."

(43) The leading case upon this point is Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; "Process from the tribunals of one state cannot run into another state and summon parties there domiciled to leave its territory and respond to proceedings against them; and publication of process or notice within the state in which the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the state, and process published within it are equally unavailing in proceedings to establish his personal liability, and a state statute authorizing such service is unconstitutional and void." The rule protects foreign corporations as well as non-resident individuals. St. Clair v. Cox, 106 U. S. 352, 27 L. Ed. 224, 1 Sup. Ct. 357; Parrott v. Alabama, etc., Ins. Co. 4 Woods, 355; Caldwell v. Armour, 1 Penn. (Del.) 551, 43 Atl. 519, 520; Laughlin v. Louisiana, etc., Ice Co., 35 La. Ann. 1185; Emerson v. McCormick, etc., Co., 51 Mich. 8, 16 N. W. 183. See Rice v. Shapleigh Hardware Co., 85 Fed. 561, 569. Service on an officer of such corporation temporarily in state cannot bind the corporation to appear, Goldey v. Morning News, 156 U. S. 521, 522, 39 L. Ed. 518, 519, 15 Sup. Ct. 560, 561; Boston, etc., Co. v. Electric, etc., Co., 23 Fed. 839; Bentliff v. London, etc., Corp., 44 Fed. 668, and Dillard v. Central Virginia, etc., Co., 82 Va. 741, 1 S. E. 128. The mere fact that the corporation has property in the state will not give a federal court jurisdiction in personam, United States v. American Bell Tel. Co., 29 Fed. 32. A judgment against a domestic corporation or against a non-resident stockholder, cannot fix the latter's individual liability if he did not appear in the suit, Wilson v. Seligman, 144 U. S. 44, 45, 36 L. Ed. 339, 12 Sup. Ct. 542 (affirming S. C. 36 Fed. 154, 155), Laredo, etc., Co. v. Stevenson, 66 Fed. 637, 32 U. S. App. 97; Wilson v. St. Louis, etc., Ry., 108 Mo. 597, 32 Am. St. Rep. 629, 18 S. W. 292; and Beyer v. Continental Trust Co. 63 Mo. App. 527, 528, 529. In King v. Sullivan, 93 Ga. 627, 20 S. E. 76, it was

therefore, from the non-residence of a foreign corporation and its inability to pass beyond the territorial limits of the state where organized, that no service outside of those limits can be "personal service," and consequently no state statute authorizing service outside of those limits would of itself be of any force. Hence the necessity for finding something upon which these statutes can be sustained consistent with the doctrine that no personal judgment against a non-resident can be sustained, without personal service, within the jurisdiction. This the courts discovered in the fact that, when a foreign corporation sent its agents into a state to do business, it necessarily assented to the terms upon which the state permitted it to engage in business within its limits, and where there was no express assent the courts found an implied assent.[44] It would seem, therefore, that statutes authorizing service upon the agents of foreign corporations within the state are logically sustainable, not on the theory that the corporation "is found" in the person of its agents, but that it has consented to such service as sufficient.[45]

Further as to Consent to Service—Waiver of Constitutional Right.—It is interesting to inquire whether, in consenting to be served in a state other than that where it was organized, a foreign corporation waives a constitutional right. Logically, there seems no escape from the conclusion that it does; for, unless its consent is a waiver of a constitutional right, the statute providing for service would be as effective without as it could be with such consent. The state does not need the consent of persons within its jurisdiction in order to make its process effective to bind them. The idea that the consent of the foreign corporation is necessary to make the statute authorizing service effective is found in most of the decisions and it permeates the legislation of the states, requiring foreign corporations to appoint an agent to receive service as a condition precedent to their right to do business in the state.[46] Some of the statutes require a written stipulation from the corporations agreeing to the terms of the state. Yet it is questionable if the mere stipulation authorizing service in accordance with the terms of the statute would bind a corporation that was not doing business in the state at the time of service. The general rule seems to be that agreements in advance to waive constitutional rights are void and will not be enforced.[47] But the consent of the corpora-

held that in a suit against an individual stockholder the corporation was a necessary party, and if foreign could not be compelled to appear. Hale v. Hardon, 95 Fed. 762, limits the rule in its application to suits to fix individual liability of stockholders declaring the tendency to be toward allowing state laws to operate extra-territorially for that purpose.

(44) Conn. Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. Ed. 569. Holding that by continuing in business in Tennessee, after the legislature had changed the mode of service, the corporation impliedly assented to the mode as changed.

(45) In some of the cases the courts have argued on both of these theories. See St. Clair v. Cox, 106 U. S. 350, 27 L. Ed. 224; LaFayette Ins. Co. v. French, 18 How. U. S. 404, 15 L. Ed. 451.

(46) In Camden Roll Mill Co. v. Swede Iron Co., 32 N. J. L. 15, it was said: "It is to be regarded as settled that, if a foreign corporation, at the time of commencement of suit, does not do business or has not any office or place of business in this state, such corporation, except by its own consent, cannot be brought within the jurisdiction of this or any other court of this state. Under such circumstances, the officers and agents of such corporations when they come into this jurisdiction, do not bring with them their official character or function."

(47) Trial by jury in cases of felony cannot be waived even at the trial. Cancemi v. People, 18 N. Y. 128; Allen v. State, 54 Ind. 461; Brown v. State, 16 Ind. 496; Bell v. State, 44 Ala. 393; Williams v. State, 12 Ohio St. 622; State v. Mansfield, 41 Mo. 470; Hill v. People, 16 Mich. 351; People v. O'Neil, 48 Cal. 257; Opinion of Justices, 41 N. H. 550; and see Bullard v. State, 38 Tex. 504, 19 Am. Rep. 30; Whallon v. Bancroft, 4 Minn. 109; Prof. Jur. Tr. sec. 113; Thomp. & M. Jur. sec. 7; Hunt v. State, 61 Miss. 577; Moore v. State, 72 Ind. 358; State v. Kaufman, 51 Ia. 578, 33 Am. Rep. 148; State v. Larrigan, 66 Ia. 426; Com. v. Shaw, 1 Pittsb. Rep. 492; Cancemi v. People, 18 N. Y. 128, 129; Trimble's appeal, 6 Watts, 133; Lauman v. Young, 31 Pa.310; Cancemi v. People, 18 N. Y. 129; State v. Holt, 90 N. C. 749; Mays v. Com., 82 Va. 550; King v. State, 3 L. R. A. 211, 87 Tenn. 304. Some of the state constitutions expressly, or by clear implication, forbid a waiver in criminal cases. Thus the Michigan constitution provides: "The right of trial by jury shall remain, but shall be deemed to be waived in all civil cases unless demanded by one of the parties." In Swart v. Kimball, 43 Mich. 448, this language was held to forbid a waiver in criminal cases, but it permits a waiver in criminal cases triable before a justice. Ward v. People, 30 Mich. 116.

tion is concurrent with the service when it continues doing business within the state until service is made and, consent by one outside of the jurisdiction, if made at the time of service, is binding even on a natural person. This was held in the case of Jones v. Merrill,[48] where the defendent who resided in Montana made the following endorsement upon the subpoena served upon him there from a Michigan court: "I hereby admit due personal service upon me, of the within subpoena, this 11th day of September, 1894." "Melissa C. Livermore." In Dunn v. Dunn [49] cited by the Michigan Court, Chancellor Walworth said: "In all cases where the court has jurisdiction over the subject matter of the suit, if the defendant who is beyond the limits of the state thinks proper to waive that objection by a voluntary appearance, or by consenting to accept as regular the service of process upon him, at the place where he resides or is found, he cannot afterwards object to the regularity of the proceedings against him founded on such service." Such seems also to be the doctrine of the English courts. In Vallee v. Dumergne,[50] it was said: "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them."[51]

A doctrine going much further than any of these cases was suggested in Pennoyer v. Neff.[52] The court in stating the rule that personal judgment against a non-resident could not be sustained without personal service within the jurisdiction, took pains to add: "We do not mean to assert that a state may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the state to receive service of process and notice in legal proceedings instituted in respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provides upon their failure to make such appointment, or to designate such place that service may be made on a public officer designated for that purpose, or in some other prescribed way." This, of course, was a mere dictum. But the legislature of Minnesota seems to have acted on the suggestion. It enacted that, "whenever a cause of action exists in favor of a resident of this state against a non-resident individual association or partnership engaged in business in this state, by reason of such business the summons may be served upon the manager, superintendent, foreman, agent, or representative of such individual association or partnership while in charge of such business, with the same effect as if it was personally served.[53] The Supreme Court of Minnesota held that this act was void as being in conflict with sec. 2 Art. 4 of the federal constitution, which guarantees to the citizens of each state all privileges and immunities of the citizens of the several states. The defendant, however, had not appointed an agent for the purpose of receiving service of process, and no question as to the effect of expressly consenting to service was presented. The court did not consider that consent could be implied as the result of engaging in business. In this respect it distinguished between a private person and a corporation, pointing out that "a non-resident person, unlike a corporation, carries on business in this state, not by virtue of its consent, but by virtue of the federal constitution which guarantees to the citizens of each state the rights, privileges and immunities of citizens of the several states; hence it cannot be im-

(48) 113 Mich. 433. See also Cheney v. Harding, 21 Neb. 65; Allured v. Voller, 107 Mich. 476.

(49) 4 Paig. 430.

(50) 4 Exch. 290, 18 L. J. Exch. N. S. 398. Cited by the United States Supreme Court in Pennoyer v. Neff, 95 U. S. 714.

(51) See also Copin v. Adamson, L. R. 9 Exch. 345.

(52) 95 U. S. 714, 24 L. Ed. 566.

(53) Laws of Minn. 1901, Chap. 278.

(54) Cabanne v. Graf, 59 L. R. A. (Minn.) 735. To like effect see also Caldwell v. Armour & Co. 1 Penn. (Del.) 545; Brooks v. Dun, 51 Fed. 138.

plied, from the fact that he does business within the state, that he consents to submit himself to the jurisdiction of its courts in personal actions upon service of summons upon the agents."[54]

The weight of authority would seem to be in favor of the proposition that a service otherwise void as violating some constitutional provision may be rendered valid by expressly consenting to it; and in the case of a foreign corporation an implied consent by doing business in the state is as effectual as an express one.

Foreign Corporations—Consent as Validating all Forms of Service.—But if one form of unconstitutionality can be cured by consent, why cannot another? Would any statute providing for service of process be held valid if it were operative only upon condition that the party served consent to the sufficiency of the service provided for. Such a condition may, it would seem, be regarded as incorporated in all statutes relating to service which are expressly confined to such foreign corporations only as may be doing business within the state at the time of service. Is this fact of itself conclusive of their constitutionality? As we have seen the courts have not so treated it, but have determined the constitutionality of these statutes largely by the same tests as if all corporations came within their purview. But the point seems nowhere to have been clearly decided. And, as we have also seen, there are dicta and decisions which warrant the inference that consent would validate any form of service, while the doctrine that consent to the terms of the statute will be implied from the fact of doing business where there is no express consent is announced either tacitly or expressly in nearly all the cases. The result is more or less confusing. There is no decison expressly denying that a voluntary consent by corporation would validate a service otherwise void, as unconstitutional, yet from a casual reading this might seem to be implied by dicta in many cases. Language used in LaFayette Ins. Co. v. French,[55] has been so often quoted that it may be regarded as authority. But it has sometimes been assumed to go much further than it really does. In that case the court said: "This corporation existing only by virtue of a law of Indiana, cannot be deemed to pass personally beyond the limits of that state. Bank of Augusta v. Earle, 13 Peters, 519. But it does not necessarily follow that a valid judgment could be recovered against it only in that state. . . . . A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state. 13 Pet. 519. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other states and by this court, *provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense.* We have italicized the language so often quoted,[56] from this opinion, and it may seem that it implies a doctrine inconsistent with the idea that the express or implied consent of a corporation voluntarily given, would validate a service otherwise void for lack of power in the state to authorize it. Certainly, the language implies that no condition inconsistent with the federal constitution which a state might impose would be held enforceable against the objection of the corporation. But there is nothing in the opinion to indicate that a corporation after voluntarily *consenting* to a form of service could defend against a judgment rendered pursuant to such service on the ground

(55) 18 How. U. S. 404, 16 L. Ed. 451.

(56) St. Clair v. Cox, 106 U. S. 350, 27 L. Ed. 223; Ex Parte Schollenberger, 96 U. S. 369; Conn. Mut. L. Ins. Co. v. Spratley ,172 U. S. 615, 43 L. Ed. 573; Home Insurance Co. v. Morse, 87 U. S. 445, 22 L. Ed. 365; Cabal v. U. S. L. Ins. Co., 191 U. S. 304, 48 L. Ed. 193; Doyle v. Continental Ins. Co., 94 U. S. 535; 24 L. Ed. 151. These are only a few of the cases in which the language referred to has been either quoted or distinctly approved.

that the statute authorizing it was unconstitutional. It is one thing to refuse to enforce a void contract against the objection of a party, but it is a very different thing to refuse to hold one to the effect of his own action taken in accordance with an agreement which he might have disregarded as void, but chose rather to perform. It may be that a statutory service would not sustain judgment if, before service was made, the corporation had ceased to do business in the state even if the cause of action arose there before the withdrawal of the corporation. The withdrawal might be treated as an election to disregard its agreement to accept as sufficient the service provided by the statute, and there may be grounds for concluding that such an agreement would not be specifically enforced. Analogous conclusions are found in many cases. Those establishing the rule that the courts will not sustain an agreement binding a foreign corporation in advance to abstain from removing causes to the federal courts are particularly in point. But this rule is very different from the one for which we are contending. The difference is well illustrated by the case of Home Ins. Co. v. Morse.[57] Conforming to the requirements of a Wisconsin statute the insurance company, before beginning business in that state, filed an agreement not to remove suits to the federal courts. Upon being sued, however, it violated this agreement and petitioned for a removal. The Wisconsin court disregarded the attempted removal and proceeded with the case, assuming that the statute and agreement were valid. The United States Supreme Court held the statute, so far as it required the agreement, unconstitutional, the agreement itself void, and no bar to the removal of the suit. Nevertheless, the court pointed out that while the right to resort to the federal courts could not be waived in advance, yet it was not one of those rights that could not be waived in any particular case distinguishing it in this regard from the right of trial by jury in criminal cases.[58] The language we have quoted from LaFayette Insurance Co. v. French (supra) goes no farther than to imply that an agreement in advance to abide by an unconstitutional form of service would not be specifically enforced.[59] It does not suggest that an assent by a corporation concurrent with the service and subsequent proceedings in the case would not be binding, even although the form of service provided for might otherwise be repugnant to the constitution of the United States. The conclusion seems justified that such consent would be a waiver of any unconstitutionality. It would seem, too, that by the decided weight of authority an express agreement to abide by a particular form of service would give to that form all the essentials of due process of law which might be otherwise lacking, so as to bind the party served in accordance with the agreement, notwithstanding his objection to the service.

Service by Publication—Foreign Corporations.—It would seem that, even under the rule suggested in LaFayette Ins. Co. v. French, that a statute providing for service, upon foreign corporations doing business in the state, by publication would be valid, provided such service was authorized only in cases where no agent or officer was to be found within the jurisdiction; for this

(57) 87 U. S. 445, 22 L. Ed. 368.

(58) On this point the court said: "Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in Cancemi v. People, 18 N. Y. 128, be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.

(59) A dictum of Mr Justice Field in St. Clair v. Cox, 106 U. S. 350, 27 L. Ed. 222, may seem to go farther than this.

form of service could hardly be regarded as contrary to the "principles of natural justice." However, the only direct decisions the writer has been able to find hold, that it is not competent for a state to authorize such service. The Supreme Court of South Carolina has so decided in several cases,[60] but its decisions were apparently reached without reference to the doctrine of consent, for it merely applied the general rule announced in Pennoyer v. Neff (supra), to the effect that jurisdiction to render a personal judgment against non-residents could be obtained only by personal service within the jurisdiction. As we have seen, it is only by virtue of the doctrine of consent that service of any kind can be authorized upon a foreign corporation outside of the state of its organization And surely it is competent to apply that doctrine to a foreign corporation doing business by mail or otherwise, than through the medium of officers or agents within the state. Would a statute requiring such corporations to consent to service by publication as a condition of their license to do business not be reasonable?

Service by Publication—Domestic Corporations.—While, as we have seen, the state has much the same power over domestic corporations as it has over foreign corporations doing business within its territory, yet the doctrine of consent has been developed with respect only to foreign corporations. There has been no pressing necessity for its application to domestic corporations for they, without the aid of that doctrine, are as much subject to the process of the courts of the state as are natural persons.[61] And the rule sustained by the weight of authority seems to be that residents who conceal themselves or cannot be found within the state may be served in a personal action by publication.[62] The reason for denying jurisdiction in personam of non-residents by publication, is founded in international usage. The comity of states forbids one to extend its jurisdiction into another, and no proceeding that attempts to do so is due process of law unless by the consent of the party proceeded against; but the reason for the rule has no application to residents of the state, and hence by the weight of authority the rule itself is not applicable to them.

W. A. COUTTS.

Sault Ste. Marie, Mich.

(60) Tillinghast v. Boston D. R. L. Co.; Moore v. S. C. Forsaith Machine Co., 39 S. C. 484, 18 S. E. 120, 122 L. R. A. 49; Toms v. Richmond & D. R. Co., 40 S. C. 523, 19 S. E. 142; Pepper v. Shearer, 48 S. C. 493, 26 S. E. 797.

(61) Bernhardt v. Brown, 36 L. R. A. 402.

(62) Bardwell v. Collins, 44 Minn. 97, 9 L. R. A. 152, 46 N. W. 315; Note to Pinney v. Providence Loan & Investment Co., 50 L. R. A. 586, citing Bitancourt v. Eberlin, 71 Ala. 461; Fleming v. West, 98 Ga. 778, 27 S. E. 157; Bimeler v. Dawson, 5 Ill. 536, 39 Am. Dec. 430; Bickerdike v. All n. 157 Ill. 95, 29 L. R. A. 782, 41 N. E. 740; Sturgis v. Fay, 16 Ind. 429, 79 Am. Dec. 440; Weaver v. Boggs, 38 Md. 255; Harryman v. Roberts, 52 Md. 65; Continental Nat. Bank v. Thurber, 74 Hun, 632, 26 N. Y. Supp. 956; Northcroft v. Oliver, 74 Tex. 162, 11 S. W. 1121; Hinckley v. Kettle River Co., 70 Minn. 105, 72 N. W. 835. In Knowles v. Logansport Gas Light & C. Co., 86 U. S. 58, 22 L. Ed. 70, it is said: "We do not mean to say that personal service is in all cases necessary to enable a court to acquire jurisdiction of the person. When the defendant resides in the state in which the proceedings are had, service at his residence and perhaps other modes of constructive service may be authorized by the laws of the state." See also cases cited in note to Moyer v. Bucks, 16 L. R. A. 339.

CRIMINAL LAW—EMPLOYER'S LIABILITY FOR WRONGFUL ACTS OF AGENT.

CITY OF PADUCAH v. JONES.

Court of Appeals of Kentucky, Oct. 25, 1907.

An employer, irrespective of his instructions or directions, may be proceeded against criminally for the act of his clerk or agent, who, within the scope of his employment, sells or furnishes liquor in violation of law.

CARROLL, J.: Paducah is a city of the second class, and under section 3058 of the Kentucky Statutes of 1903, the general council have the right "to license, tax and regulate the sale of spirituous, vinous and malt liquors in saloons and coffee houses." In pursuance of this authority, the council enacted an ordinance providing that: "Every person, firm, company or corporation desiring to keep a coffee house, saloon, clubroom, or other establishment wherein spirituous, vinous or malt liquors are sold by retail, shall make application therefor in writing to the general council giving the number of

the house, and street on which same is located in which said business isto be carried on, with the receipt of the city treasurer for the amount required for such license as herein fixed, and also the proper receipt of the proper officer for county and state or other license than city license where such license is required; and the names of two good sureties resident of McCdacken county, Kentucky, and the owner of real estate therein, as bondsman. If said general council shall approve and accept such sureties and grant said license, the clerk of said city of Paducah shall thereupon issue to the said applicant upon his entering into a bond with said sureties to said city according to law in the penalty of one thousand dollars, conditioned that he, she, they or it will keep a quiet, orderly house, and will not permit gaming or riotous or disorderly conduct therein, and shall not keep open his bar nor offer for sale any spirituous, vinous or malt liquors on Sunday; and otherwise comply with all the ordinances of the city of Paducah in relation to coffee houses, saloons and clubrooms. But the clerk shall not issue said license until the said bond is executed as aforesaid, and said person, firm, company or corporation shall not commence business until said license shall issue." Appellee, J. L. Jones, upon his application to keep a coffee house and sell therein spirituous, vinous, and malt liquors, was granted license so to do, and thereupon in compliance with the ordinance executed the following bond, which was accepted by the city: "Know all men by these presents that we, J. L. Jones, as principal and Adolph Weil and Lee Weil, sureties, are held firmly bound unto the said city of Paducah in the sum of one thousand dollars the payment thereof well and truly to be made, we bind ourselves, our heirs, executors, administrators or assigns, jointly and severally, by these presents, sealed with our seals, and dated this, the 2d day of January 1905. Now, the condition of this bond is such whereas the above named J. L. Jones hath obtained from the general council aforesaid a license to keep a coffee house to sell spirituous, vinous, and malt liquors therein in the city of Paducah for one year. Now, if the said J. L. Jones shall well and truly observe the laws of the commonwealth, and the laws and ordinances of the city of Paducah relating to coffee houses, then this bond is to be void otherwise to remain in full force and effect." Ky. St. 1903, § 1303, as well as an ordinance of the city of Paducah, prohibit the sale of spirituous, vinous, or malt liquors on Sunday. A warrant was issued against Jones, charging him with the offense of selling liquor on Sunday, and upon his confession of guilt he was fined, thereupon the city instituted this action upon his bond, seeking to recover thereon the sum of $1,000.

Two interesting questions are presented for our consideration: First, Was Jones guilty of selling liquor on Sunday? Second, Did the general council have the right as a condition precedent to the issual of licenses to exact the bond in question, and, if so, the facts authorizing it, can there be a recovery for the full amount? The sureties upon the bond of Jones were not estopped by his confession of guilt or conviction of the offense from showing in an action against them that no breach of the bond had been committed. They were not parties to the penal proceeding against him, and, as their liability upon the bond depended upon the question whether or not he had committed a breach of his obligation, they had the right in an action against them to show that he had not. Margoley v. Commonwealth, 3 Metc. 405; Commonwealth v. Stringer, 78 Ky. 56.

The evidence in this action disclosed the following facts: The coffee house conducted by Jones was in the rear of a grocery store also operated by him; the coffee house being separated from the grocery by swinging doors. He employed a clerk to attend to both the coffee house and the grocery, and on the Sunday in question Jones went out in the country, but before leaving gave his key to the clerk, telling him "to open up," not indicating whether he desired him to open the grocery or the saloon, or both. Soon after his departure, the clerk did "open up," and during the day before the return of Jones sold liquor to numbers of persons. When Jones returned late in the afternoon, he found in the coffee house or saloon a number of persons, and, after ordering them out, closed the doors. The clerk had been in the employment of Jones for some time, and testified that his duties on Sunday were the same as those during the week, with the exception of the saloon. During his examination, he was asked by counsel for the city if the saloon had not been kept open on other Sundays. Objection was made, and sustained, and it was avowed that the witness, if permitted to answer, would say that on several Sundays the clerk with the knowledge of Jones kept open the saloon, and sold liquor to persons desiring to purchase. The trial judge was of the opinion that Jones was not responsible or liable for the act of his clerk in keeping open the saloon on the Sunday for which it was sought to recover on the bond, as Jones did not authorize the opening of the saloon or the sale of whisky therein, nor did he know or assent thereto or ratify or approve the same; and upon this issue, which was decisive of the case, rendered a judgment in favor of appellee. With the excluded evidence out of the record, it did not appear that the clerk in opening the saloon and selling liquor was acting within the scope of his employment or by the knowledge or with the consent of Jones, but, on the contrary, the inference was that he was acting entirely for himself, and the trial judge was correct in his conclusion; but we are of the opinion that he erred in failing to permit the city to prove that on previous Sundays, with the knowledge and consent of Jones, his clerk had opened the saloon and sold whisky therein. This evidence was competent upon the ground that it conduced to show whether or not the selling by the clerk on the Sunday in question was within the scope of his employment or by the consent of Jones. If the clerk of Jones in selling liquor on Sunday or in violation of law was acting within the scope of his employment, or by the consent of Jones, then Jones was liable to prosecution for his acts. Jones merely told his clerk to "open up." He did not give him any other directions, or limit him to selling groceries, or forbid him to sell liquor. What he intended to convey to his clerk by the direction

to "open up," depends largely on what his clerk had done on previous Sundays. If theretofore on Sundays he had opened up both the saloon and the grocery, it would seem to follow that the directions gave him authority to do the same on this Sunday, although the conduct of Jones in closing the saloon on his return would indicate that he had not intended that his clerk should open it. If it should appear that the clerk had been in the habit of opening the grocery but not the saloon on Sunday, then the direction to open up would not give him authority to open the saloon, and in opening it he would not be acting within the scope of his employment and Jones would not be liable. However this may be, in view of the indefiniteness of Jones' direction, it was competent for the purpose of explaining the sense in which it was used by Jones and understood by the clerk to show what had been the practice and custom on previous Sundays, and that the clerk in opening up was obeying what he conceived to be the order of Jones in the light of what happened at other times, and the jury, in determining whether or not the clerk was selling with the knowledge or consent of Jones or in the scope of his employment, had the right to consider this evidence. If the direction to "open up" meant that the clerk should open the saloon as well as the grocery, then Jones was liable for the clerk's violation of the law, as in selling he was acting within the scope of his employment, and with the consent of Jones, and, in either event, Jones was liable for his acts. The decisions are conflicting upon the question whether or not the master or principal is liable to a criminal prosecution for violations of statutory laws committed by the agent or servant acting within the scope of his employment.

In Massachusetts the rule seems to be that generally the master is not responsible unless in some way he participates in, countenances, or approves the criminal act of his servant (Commonwealth v. Stevens, 153 Mass. 421, 26 N. E. Rep. 992, 11 L. R. A. 357, 25 Am. St. Rep. 647), although in that jurisdiction there are exceptions to the rule; the court saying in Commonwealth v. Nichols, 10 Metc. (Mass.) 529, 43 Am. Dec. 433: "It seems to us that in the case of the sale of liquors prohibited by law at the shop or establishment of the principal by the agent or servant usually employed in conducting his business is one of that class of cases in which the master may properly be charged criminally for the acts of the servant." And it is ruled in both the foregoing cases that, if the sale is made by the servant, in opposition to the will of the master, and is in no way approved by him, he is not liable. In North Carolina, the court in an exhaustive opinion in State of North Carolina v. Kittelle, 110 N. C. 560, 15 S. E. Rep. 103, 15 L. R. A. 694, 28 Am. St. Rep. 698, after reviewing fully all of the authorities, came to the conclusion that the principal is criminally liable for the conduct of his clerk acting within the scope of his employment in selling liquor in violation of law. And this rule prevails in Maryland (Carroll v. State, 6. Md. 551, 3 Atl. Rep. 29); Georgia (Snider v. State, 81 Ga. 753, 7 S. E. Rep. 631, 12 Am. St. Rep 350); Arkansas (Mogler v. State, 47 Ark. 110, 14 S. W. Rep. 473); Mississippi (Riley v. State, 43 Miss. 397); Iowa (Dudley v. Sautbine, 49 Iowa, 650, 31 Am. Rep. 165); Michigan (People v. Roby, 52 Mich. 577, 18 N. W. Rep. 365, 50 Am. Rep. 270). In the Iowa case, the court very aptly said: "The argument briefly stated is that the agent is employed for a lawful purpose and no other. If he does an unlawful act and especially forbidden by his principal, he acts outside of his agency. And so it is argued that the statute which imposes a penalty for selling in prohibited cases by the agent has no application to this case. The clerk was employed to sell wine and beer, and, while it is true that in one sense he was not employed to sell to persons in the habit of becoming intoxicated, he was employed to determine who among those applying to purchase were in such habit and to sell to persons who were not. We think then, that the agent's fault did not consist in doing what was beyond the scope of his agency, but in doing improperly what was within it. Most certainly a principal cannot escape civil liability for his agent's negligence by instructing him not to be guilty of negligence." The Iowa statute under which this prosecution was had provided that it should be unlawful for any person "by agent or otherwise" to sell intoxicating liquors to persons in the habit of becoming intoxicated; but the court did not rest its decision on the wording of this statute, but upon the general principle that in cases of this character the master is liable for the acts of his servant within the scope of his employment. In the Michigan case the keeper of a hotel was prosecuted for the act of his clerk in selling liquor on Sunday. The point was made that, as there was no evidence to show that the proprietor consented to the sale or to the opening of the bar, he was not liable for the acts of his clerk. But Judge Cooley, writing for the court, said: "I agree that as a rule there can be no crime without a criminal intent; but this is not by any means a universal rule. Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." And this court in Locke v. Commonwealth, 113 Ky. 864, 69 S. W. Rep. 763, 38 L. R. A. 237, 101 Am. St. Rep. 374, and Ellison v. Commonwealth, 69 S. W. Rep. 765, 24 Ky. Law Rep. 657, approved an instruction which told the jury that, if the sale was made by an authorized agent or clerk in the regular course of business, the defendant was guilty.

If a criminal intent was necessary to constitute the offense of selling liquor on Sunday or to a minor or without license or in violation of law, it would follow that the employer who had directed his clerk not to sell, or if the sale was made without his knowledge, or consent, could not be criminally liable, as the intent necessary to complete the offense would be lacking; but there are a number of statutory offenses in which the law does not inquire into the intention of the person who violates them. His intention is not taken into consideration. It is totally immaterial whether it was good or bad. It is the act constituting the offense that the law looks at and punishes, and not the intention of the perpetrator. This rule is appli-

cable to statutory offenses in the nature of police regulations, such as the carrying of concealed deadly weapons, the illegal sale of liquor, gambling, certain species of trespass, injuring property, disturbing lawful assemblies, furnishing cigarettes, and numerous others in the same category. And the character of the business carried on by retail dealers in spirituous liquors, the temptation offered by it to violate the law growing out of the nature of the traffic, renders it peculiarly appropriate that the principle announced should embrace those engaged in it, even more certainly than it does other occupations or transactions where no criminal intent is necessary to constitute a violation of the law. Therefore we do not hesitate to say that the employer may be proceeded against criminally for the act of his clerk or agent, who, in violation of law, sells or furnishes liquor acting within the scope of his employment, and this without reference to the instruction or direction given to him by the employer. When a person obtains a license from the state to sell liquor, and for his own convenience and advantage employs other persons to conduct the business for him, he will be charged with responsibility for their acts, and cannot shield himself from prosecution upon the ground that what they did was contrary to his wishes, or in disobedience of his command. He assumes the risk of their acts in the business for which he has employed them; and, if he desires to save himself harmless, must see to it that his servants while acting for him do not violate the law. In answer to this, the argument is made that, if the servant or clerk violates the law in opposition to his employer's directions, he is acting outside the scope of his employment, and hence the employer is not responsible. In a limited sense, and with respect to many crimes, this is true, but in violations of the liquor law, as in sales to inebriates or minors or on prohibited days, it is not. The employer has placed it within the power of his clerk to observe or disobey the law. He has left it to his discretion and judgment, and is answerable for his conduct. The person who obtains the license authorizing the sale of intoxicating liquor cannot by employing others to dispense it evade the responsibility attaching to the personal privilege granted to him. If this could be done, it would be an easy matter for vendors of liquors by retail to escape all of the obligations to observe the law assumed when the license was obtained, under the pretense that the violations were committed without their knowledge or consent, although by persons they had interested with the management of the business. When the proper authorities grant to an applicant the privilege of retailing liquor, the person obtaining the license takes it charged with the duty that he will not violate the law, and this obligation he cannot escape by surrendering to perhaps irresponsible clerks or bartenders the conduct of his business; and, while receiving the benefits of their illegal sales, protect himself from prosecution upon the ground that he did not authorize or approve their acts. The duty of observing the law imposed by the acceptance of the license attaches to all persons who by employment of the licensee conduct the business under it. Their offense is his offense. Except for his license they could not violate the law, and he will be held responsible for what they do. The law looks to the person intrusted with the authority, and not the subordinate he has seen proper to employ.

It is argued that the council had no authority to require an applicant for saloon or coffee house license to execute a bond, and therefore the bond is not an enforceable obligation against the sureties. In this contention we cannot concur. The statute has invested these municipalities with the exclusive right to regulate and control the granting of liquor licenses; the only limitation upon their discretion being that the conditions imposed shall not be arbitrary or unreasonable. Within these limitations, they have the right to provide as a precedent to the granting of the license that the applicant shall perform all the conditions imposed. It is with him to decide whether he will accept it or not. The license is not a right that the applicant may demand and have for the asking. It is a mere privilege that the authorities may or may not give in their discretion. It cannot be successfully maintained that the requirement of the execution of a bond that the licensee will observe the law is an unreasonable condition. On the contrary, it is not only a reasonable, but a proper, condition, the imposition of which exercises a restraining influence and has a tendency to compel an observance of the law. The licensee who intends to obey the law cannot object to giving surety for his good behavior, while the applicant who contemplates its violation will find his way beset with more than ordinary trouble. In fact, he takes the license subject to all the laws in force regulating or prohibiting the sale of liquor, and they become a part of the license. The bond executed by the licensee is nothing more than security that he will obey the law. The sureties in the bond bind themselves that he will do this. It is on their part a contract obligation; and, if the bond is broken, as between them and the licensing authorities, they are liable for the sum stipulated in it. The question of the amount of damages caused by the violation of the law by the principal does not, and cannot, enter into the question. It is not contemplated that the recovery should be for any less sum than that fixed. It would be totally impracticable if not impossible in an action by the city on the bond to arrive at any measure of damage, except the amount stipulated. In an action upon a bond properly executed, the only legitimate subject of inquiry is whether or not the conditions of the bond have been broken. If it has, the sureties by the letter of their undertaking agree that they will pay a certain sum. Clark v. Barnard, 108 U. S. 436, 2 Sup. Ct. Rep. 878, 27 L. Ed. 780; State v. Corron, 73 N. H. 434, 62 Atl. Rep. 1044. Nor will the bond be satisfied by the payment of the fine imposed in criminal proceedings against the principal. It is an independent obligation exacted as additional protection to compel an observance of the law, and the sureties are bound by the terms of their undertaking to pay the full amount specified if its conditions have been broken. The requirement of a bond with surety in a fixed sum would be almost a useless formality if it could be sat-

isfied by the payment of a fine entered against the principal. This idea is not embraced either in the letter or meaning of the bond. There is no mention that the satisfaction of the fine will discharge it. The collection of the penalty is a matter between the municipality and the offender, and the sureties have no concern in its payment, and are not responsible for it.

Wherefore the judgment is reversed, with directions for a new trial not inconsistent with this opinion.

Note—Criminal Liability of an Employer for the Act of His Clerk Within the Scope of His Employment When He Sells or Furnishes Liquor in Violation of His Employment.

The principal case is an interesting one in view of the many prosecutions which are taking place, as a result of the organized efforts to do away with a traffic, which has proved to be the great curse of our land.

The case is well considered and the conclusion reached that the principal is liable criminally for the act of his agent in selling liquor unlawfully, whether the principal directed the agent or not. The position is aptly put by Mr. Justice Carroll in the principal case where he quotes from the Iowa case, Dudley v. Santbine, 49 Ia. 651, 31 Am. Rep. 165, as follows:

"The argument briefly stated is that the agent is employed for a lawful purpose and no other. If he does an unlawful act and especially forbidden by his principal, he acts outside of his agency. And so it is argued that the statute which imposes a penalty for selling in prohibited cases by the agent has no application to this case. The clerk was employed to sell wine and beer, and, while it is true that in one sense he was not employed to sell to persons in the habit of becoming intoxicated, he was employed to determine who among those applying to purchase were in such habit and to sell to persons who were not. We think, then, that the agent's fault did not consist in doing what was beyond the scope of his agency, but in doing improperly what was within it. Most certainly a principal cannot escape civil liability for his agent's negligence by instructing him not to be guilty of negligence.' The Iowa statute under which this prosecution was had provided that it should be unlawful for any person 'by agent or otherwise,' to sell intoxicating liquors to persons in the habit of becoming intoxicated; but the court did not rest its decision on the wording of this statute, but upon the general principle that in cases of this character the master is liable for the acts of his servant within the scope of his employment." 29 Am. Dig. secs. 187-191.

It seems irresistible that a liquor dealer should not be exempt from the ordinary rules of agency. Qui facit per alium facit per se. Two cases may be taken to show where the line is drawn. In the case of Lewis v. State, 21 Ark. 209, an employer expressly authorized his clerk to make illegal sales of liquors. It was held that both were indictable. In the case of Campbell v. State, 79 Ala. 271, on an indictment for selling intoxicating liquors without a license, contrary to law, it was held that a person cannot be convicted who had no interest in the liquor sold, nor in the money paid for it and who merely acted as agent for the purchaser in procuring the liquor.

It was held in Illinois, in Johnson v. People, 83 Ill. 431, that a person engaged in making change for parties engaged in unlawfully selling intoxicating liquors, may be indicted for selling liquors as aiding and assisting in the transaction; and in Massachusetts it was held when a master intrusts to his servant the management and control of his business of selling liquor in his absence both may be convicted of keeping and maintaining the tenement, Commonwealth v. Mahony, 152 Mass. 493. It was held in Missouri, that where liquors are sold by an agent or clerk, his employer not being licensed, either party may be indicted. Schmidt v. State, 14 Mo. 137.

It was held in United States v. Paxton, Fed. Cas. No. 16013, 1 Cranch C. C. 44; United States v. Schuck, Fed. Cas. No. 16285, 1 Cranch, C. C. 56, that a servant selling spirituous liquors without a license is not liable to the penalty; but in Arkansas it is held that a conviction is warranted for selling liquor as the agent of one who has no license. Baird v. State, 52 Ark. 326, 12 S. W. Rep. 566.

It was held, in the case of Abel v. State, 9 Ala. 631, 8 So. Rep. 760, that one who unlawfully sells liquor, as clerk or agent for a wholesale liquor dealer, without a license, may be convicted of carrying on the business of a wholesale liquor dealer without license, though he has no pecuniary interest other than as agent or clerk. See Baird v. State, 52 Ark. 326, 12 S. W. Rep. 566; Menken v. City of Atlanta, 78 Ga. 668, 2 S. E. Rep. 259; State v. Finan, 10 Ia. 19.

In Maine under a law declaring that any clerk, agent or other person in the employment of or on the premises of another, who violates, or in any manner aids or assists in violating any act relating to intoxicating liquors, is equally guilty with the principal, and shall suffer like penalties, one who participates in the commission of a misdemeanor of keeping a liquor nuisance to such an extent as to render himself criminally liable at all is liable as a principal, and may be indicted and convicted, and punished as such, although the capacity in which he acted was that of a clerk, agent or servant merely. State v. Sullivan, 83 Me. 417, 22 Atl. Rep. 381. See Commonwealth v. Hadley, 52 Mass. (11 Metc., 866; Commonwealth v. Kimball, 105 Mass, 465; Same v. Dowling, 114 Mass. 259; Same v. Buck, 114 Mass. 261; Same v. Churchill, 136 Mass. 148; Same v. Sinclair, 138 Mass. 493; Same v. Brady, 147 Mass. 583, 18 N. E. Rep. 568; Same v. Brown, 154 Mass. 55, 27 N. E. Rep. 776, 13 L. R. A. 145; People v. Lester, 80 Mich. 643, 45 N. W. Rep. 492; People v. Rice, 103 Mich. 560, 61 N. W. Rep. 540.

In Missouri it is held no defense to an indictment for selling liquor without license that the defendant sold it as agent for another person. Hayes v. State, 13 Mo. 246; State v. Bryant, 14 Mo. 3406 State v. Morton, 42 Mo. App. 64. Same holding in New Hampshire: Wason v. Underhill, 2 N. H. 505; State v. McGuire, 64 N. H. 529, 15 Atl. Rep. 213. In New York see French v. Parker, Cr. R. 114. Rhode Island; State v. Hoxsie 15 R. I. 1, 22 Atl. Rep. 1059, 2 Am. St. Rep. 838. Texas: Janks v. State, 29 Tex. App. 233, 15 S. W. Rep. 815. Vermont: State v. Bugbee, 22 Vt. 32. Wisconsin: Peitz v. State, 68 Wis. 538, 32 N. W. Rep. 763; Mayer v. State, 83 Wis. 339, 53 N. W. Rep. 444.

A principal is criminally liable for acts of his servant in selling intoxicating liquors without license. U. S. v. Voss, Fed. Cas. No. 16628, 1 Cranch C. C. 101. See Edgar v. State, 45 Ark. 356; State v. Bassennan, 54 Conn. 88, 6 Atl. Rep. 185; Loeb v. State, 75 Ga. 258; Snider v. State, 81 Ga. 753, 7 S. E. Rep. 631, 12 Am. St. Rep. 350; McCulcheon v. People 69 Ill. 601, 91 Ill. 494;

State v. Wentworth, 65 Me. 234, 20 Am. St. Rep. 688; Commonwealth v. Hurley, 160 Mass. 10, 35 N. E. Rep. 89; Fullwood v. State, 67 Miss. 554, 7 So. Rep. 432; State v. Durkham, 23 Mo. App. 387; Martin v. State, 30 Neb. 507, 46 N. W. Rep. 621; State v. Williams, 3 Hill Law (S. Car.), 91; Collins v. State, 34 Tex. Cr. App. 95, 29 S. W. Rep. 274; State v. Dow, 21 Vt. 484, 29 Am. Dig. Secs. 187-192.

JETSAM AND FLOTSAM.

Hanging Habitual Criminals.

Under Jetsam and Flotsam in Volume 65, No. 19, of the November number of the Central Law Journal, appeared an interesting article, and doubly interesting on account of the source of the utterance: "Hang Habitual Criminals."

The question to be considered, regarding the severity of the penalty in criminal cases, is the reformatory effect on the criminally inclined.

During the early history of England severe penalties were inflicted for crime and cruel methods resorted to in taking life of those convicted, yet with little or no good in beneficial effects, so far as reducing crime was concerned.

In Hume's History of England, Volume 3, Chapter 32, page 81, appears the following: "Harrison asserts that seventy-two thousand criminals were executed during the reign of Henry the VIII for theft and robbery, which would amount to nearly two thousand a year. He adds that in the latter end of Elizabeth's reign there were not punished capitally four hundred in a year. It appears that in all England there are not at present fifty executed for these crimes." "If these facts be just," says Hume, "there has been a great improvement in morals since the reign of Henry the VIII, and this improvement has been chiefly owing to the increase of industry and the arts, which have given maintenance, and what is almost of equal importance, occupation to the lower classes."

Does history and present conditions in the United States bear out this statement of Hume? In the eastern district of Oklahoma there are still pending something over two thousand criminal cases undisposed of, as an inheritance to the new state, from federal rule where severe punishment followed conviction, and where opportunities for acquiring property were numerous and easy.

The State of Oregon has a habitual criminal act, in which life sentence is provided for persons convicted of crime three times. This act may be of some benefit, but all must admit that it is a very slow process of criminal elimination —and again—it is not always easy to determine that the accused has served previous sentences.

If the criminal statutes in effect in most of the states and "habitual criminal acts" in force in such states as Illinois and Oregon have done little or no good in a reformatory way, is it not almost time other methods were tried? Why not cut off the supply of criminals? Remove the cause by cleansing the stream.

For several years in the early days of Oklahoma the writer made a specialty of criminal law and had splendid opportunities in that new region for studying criminology and reformatory effects of criminal statutes on criminals, I now have in mind one case where the party was sent to the penitentiary three different times for horse stealing and on his return home after the third sentence was soon in the toils of the law for introducing liquor into one of the Indian Reservations. Time in the penitentiary hardened him and had no reformatory effect. He seemed to feel that he was an outcast and crime the only avocation open to him. If every person convicted of a crime and sentenced to the penitentiary were deprived of the powers of procreation as a condition precedent to release and pardon, the criminal supply would soon become exhausted. If to inflict this penalty it be necessary to amend the constitution so the penalty could not be regarded "cruel and unusual punishment," then amend the constitution and make it possible to save the human family from criminal pollution.

In addition to the above suggestions as essentials in elimination of crime, our marriage laws ought to be so amended that habitual drunkards and criminally diseased persons, and those suffering from well developed cases of consumption should be prohibited from entering into marriage relations. With these changes and some modification in our liquor laws, I feel confident that negro criminals would rapidly decrease and the white ones in the United States would either reform or move to Old Mexico.

D. C. LEWIS.

Bellingham, Wash.

HUMOR OF THE LAW.

One of our esteemed correspondents vouches for the truth of the following incident:

In a replevin suit tried in the District Court of Bryan County, Oklahoma, recently, in which the ownership of a mule was in controversy, the attorney for the plaintiff in his opening commented on the fact that the defendant who had retained the possession of the animal in controversy, had been requested to produce the animal at the trial so that the jury might inspect it, and had failed to do so. The attorney for the defendant when he came to reply to that part of the argument, answered as follows: "And gentlemen of the jury, they howl because we hav'nt brought the mule here and put him on the stand. Now, gentlemen, we don't have to bring the mule here. If the plaintiff wanted the mule they could have had a sobpœna *duces tecum* issued to have brought that mule here."

Some years ago, when Judge Addison was hearing county court cases in conjunction with Judge Bacon, a women, whom the former had had occasion to lecture rather severely, took an egg out of her handbag and hurled it at him. Luckily, the egg missed the mark, whereupon Addison turned with a smile to the bar and said: "I really think that egg must have been intended for my brother Bacon."

"The question is as to the intent of the law."

"That's easy; the intent of the law is to make business for the lawyers.—Syracuse Herald.

An American lawyer, who seemed unable to arrive at the end of a prolonged speech, at last ventured to express a fear that he was taking up too much time.

"Oh, never mind time," observed the judge, "but for goodness sake, do not trench upon eternity."—Buffalo Commercial.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Accident Insurance**—Action by Non-resident.—Held, that a non-resident may sue a foreign casualty company on a policy written outside the state, though the accident and death both occurred outside the state.—Patton v. Continental Casualty Co., Tenn., 104 S. W. Rep. 305.

2. **Account Stated**—Admissions.—Where a debtor to whom an account is rendered admits the correctness of all the items, the fact that he objects to the interest does not prevent the statement from taking effect as an account stated as to the admitted items.—Vogel v. Kennedy, Mo., 104 S. W. Rep. 1151.

3. **Acknowledgment**—Validity.—A note evidencing a conditional sale and a reservation of title attested by a stockholder in a corporation in whose interest such writing is executed is inadmissible in evidence.—Betts-Evans Trading Co. v. Bass, Ga., 59 S. E. Rep. 8.

4. **Aliens**—Wrongful Landing.—That an alien seaman deserting while on shore leave was a stowaway held not to bring the case within the provisions of Immigration Act March 3, 1903, c. 1012, sec. 18, 32 Stat. 1213, 1217.—Taylor v. United States, U. S. S. C., 28 Sup. Ct. Rep. 53.

5. **Appeal and Error**—Assignment of Error.—Where, in an action of trespass, an assignment of error to the amount of damages is subject to the objection of generality, the evidence will be considered as warranting the verdict rendered.—Bollinger v. McMinn, Texas, 104 S. W. Rep. 1079.

6.——Breach of Contract.—The court on appeal from a judgment for defendant in an action for breach of contract, held required to reverse the judgment to enable plaintiff to show substantial damages.—Harman v. Washington Fuel Co., Ill., 81 N. E. Rep. 1017.

7.——Cross Bill of Exceptions.—Where the controlling question in a case is presented by a cross-bill of exceptions and the judgment below is reversed, the writ of error on the main bill will be dismissed.—Betts-Evans Trading Co. v. Bass, Ga., 59 S. E. Rep. 8.

8.——Excessive Verdict.—A verdict should not be set aside as excessive unless it clearly appears that the jury have committed some gross error or have acted under some improper bias or mistaken the rules of law.—Arkansas Valley & W. Ry. Co. v. Witt, Okla., 91 Pac. Rep. 897.

9.——Finality of Decision.—A decree reversing some of the findings of the court below in an action for an accounting, and directing a new decree to be entered, held not final for purposes of appeal.—Earle v. Myers, U. S. S. C., 28 Sup. Ct. Rep. 86.

10.——Findings of Fact.—Failure of circuit court of appeals to make findings of fact and conclusions of law as required by General Order in Bankruptcy 36, cl. 3, on appeal to federal supreme court, cannot be supplied by reference to the opinion of such circuit court of appeals.—Chapman v. Bowen, U. S. S. C., 28 Sup. Ct. Rep. 32.

11.——Harmless Error.—Though counsel should have been permitted to state his objections to a question, yet that he was not permitted to do so held not to be reversible error.—Concord Apartment House v. O'Brien, Ill., 81 N. E. Rep. 1038.

12.——Leading Questions.—The propounding of leading questions and the admission of the answers cannot be so considered as cause for new trial, where it is shown what the answers were.—Brunswick & B. R. Co. v. Hoodenpyle, Ga., 58 S. E. Rep. 705.

13.——Review of Facts.—Findings by auditor confirmed by the court below will be affirmed by supreme court, unless clearly erroneous.—Earle v. Myers, U. S. S. C., 28 Sup. Ct. Rep. 86.

14.——Rule Governing Review.—Rule governing the review of the question whether a nonsuited plaintiff in an action for negligence has made out a prima facie case stated.—Luehrmann v. Laclede Gas Light Co., Mo., 104 S. W. Rep. 1128.

15.——Withdrawal of Plea in Abatement.—Exception to refusal to reconsider order permitting withdrawal of plea in abatement and filing of plea in bar held not reviewable in the federal supreme court.—Chunn v. City & Suburban Ry. of Washington, U. S. S. C., 28 Sup. Ct. Rep. 63.

16. **Arson**—Burden of Proof.—Where nothing appears but the burning, the law presumes that the fire was the result of accident, and the burden is on the state to prove, beyond a reasonable doubt a criminal design.—Ragland v. State, Ga., 58 S. E. Rep. 689.

17. **Associations**—Right to Hold Property.—Voluntary associations may receive and hold property in common as individuals, but cannot act as trustee or hold real estate in their aggregate names as organizations.—Guild v. Allen, R. I., 67 Atl. Rep. 855.

18. **Bail**—Defenses.—Incarceration in a town lockup of the principal in a bail bond at the time he was called and his bond forfeited held

no defense to the liability of his surety; the principal not having appeared after his release nor renewed his bond.—State v. Holt, N. C., 59 S. E. Rep. 64.

19. **Bankruptcy**—Discharge.—Where defendant shows his discharge in bankruptcy, the burden is on plaintiff to show his claim not within the discharge by reason of its being within an accepted class.—Van Norman v. Young, Ill., 81 N. E. Rep. 1060.

20.——Effect on Foreclosure of Mortgage.—Where in a suit to foreclose a mortgage there is an incidental prayer for relief appropriate to insolvency, a receiver's possession of the property mortgaged will not be affected by a subsequent adjudication in bankruptcy.—Nelson v. Spence, Ga., 58 S. E. Rep. 697.

21.——Equitable Liens.—Sellers of property to a bankrupt on contracts reserving title until payment held under the facts shown to have no equitable claim upon the proceeds of the remnants of such property and other property remaining after a fire, after its sale by the trustee in bankruptcy.—Hanson v. W. L. Blake & Co., U. S. D. C., D. Maine, 155 Fed. Rep. 342.

22.——Mandate of Supreme Court.—Decree of federal district court for transfer to adverse claimants of proceeds of sale of property not in possession of trustee of bankrupt, without prejudice to the rights of such trustee, held a sufficient compliance with the mandate of the federal supreme court.—First Nat. Bank v. Chicago Title & Trust Co., U. S. S. C., 28 Sup. Ct. Rep. 23.

23.——Preference.—The assignment by a bankrupt within four months prior to his bankruptcy, and while insolvent, of a claim against an insurance company for a fire loss, to secure a prior indebtedness, was void as a preference, and created no legal or equitable lien in favor of the assignee to the insurance money as against the trustee in bankruptcy.—Hanson v. W. L. Blake & Co., U. S. D. C., D. Maine, 155 Fed. Rep. 342.

24.——Property Passing to Trustee.—Where machinery sold and shipped to a corporation to be paid for in cash was delivered without such payment, at its request and promise to send a check, which was not done, and afterward the seller's agent settled the claim by taking negotiable vouchers for the price secured by collateral, the title to the machinery passed to the purchaser at least on such settlement, and on its subsequent bankruptcy to its trustee.—In re Cullman Fruit & Produce Ass'n, U. S. D. C., N. D. Ala., 155 Fed. Rep. 372.

25.——Right to Sue.—Under Bankr. Act July 1, 1898, c. 541, sec. 70, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), an action for land which had been voluntarily abandoned by a bankrupt held maintainable only by the trustee in bankruptcy.—Martin v. Smith, Ky., 104 S. W. Rep. 310.

26.——Unrecorded Mortgage.—A chattel mortgagee, whose mortgage was not recorded as required by statute until after the bankruptcy of the mortgagor, and who after the destruction by fire of the greater part of the property took no steps to obtain possession of the remainder, held to have no equitable lien upon the proceeds of the same when sold by the trustee in bankruptcy.—Hanson v. W. L. Blake & Co., U. S. D. C., D. Maine, 155 Fed. Rep. 342.

27. **Banks and Banking**—Application of Deposits.—Funds deposited in a bank held not under the bank's control, but subject to check, and not subject to the bank's application to specified debts, without the depositor's consent.—Bank of Spartanburg v. Mahon, S. C., 59 S. E. Rep. 31.

28.——False Entries in Books.—In a trial under Kirby's Dig. sec. 1726, for making a false entry in a banking corporation's books, the corporation's name as alleged in the indictment may be shown by evidence that it was known by such name.—Mears v. State, Ark., 104 S. W. Rep. 1095.

29. **Benefit Societies**—By-laws.—The provision for forfeiture in the by-laws of a mutual benefit association held to apply to members joining during the year, as well as to those belonging at the beginning of the year.—Morrison v. Mutual Benev. Ass'n of Chesterfield County, S. C., 59 S. E. Rep. 27.

30.——Failure to Disclose Sickness.—Insured's failure to disclose his having consulted a physician for hemorrhages within 60 days prior to signing the application for insurance held a breach of the condition precedent, avoiding the certificate.—Modern Woodmen of America v. Angle, Mo., 104 S. W. Rep. 297.

31.——Lex Loci Contractus.—The lex loci contractus governs in any action involving the rights growing out of the contract between a fraternal beneficiary corporation and its members.—Mock v. Supreme Council Royal Arcanum, 106 N. Y. Supp. 155.

32. **Bills and Notes**—Pleading.—A petition praying for judgment on a note held not to raise a question of public policy so as to make the petition demurrable on that ground.—Sparks v. Oklahoma Const. Co., Okla., 91 Pac. Rep. 839.

33. **Burglary**—Breaking and Entering.—A laborer, who, while on a leave of absence, obtained by deception the key to enter his master's house with intent to steal therefrom, held guilty of a violation of Ky. St. 1903, sec. 1162.—Young v. Commonwealth, Ky., 104 S. W. Rep. 266.

34. **Carriers**—Carriage of Live Stock.—A carrier of live stock, in the absence of negligence, is not liable for injuries due to the inherent natural propensities and habits of the animals themselves, notwithstanding the "ordinary of its kind" may have the same inherent natural propensity or habit.—Texas Cent. R. Co. v. G. W. Hunter & Co., Tex., 104 S. W. Rep. 1075.

35.——Conditions of Incorporation.—Street railway company whose charter subjects it to all the restrictions set forth in all general laws held bound by a statute previously enacted requiring railway companies to transport school children at a reduced rate.—Interstate Consol. St. Ry. Co. v. Commonwealth of Massachusetts, U. S. S. C., 28 Sup. Ct. Rep. 26.

36.——Contributory Negligence of Passenger.—Person standing on platform at a customary stopping place awaiting an approaching car held not guilty of contributory negligence as a matter of law.—Chunn v City & Suburban Ry. of Washington, U. S. S. C., 28 Sup. Ct. Rep. 63.

37.——Failure to Receive Goods for Transportation.—A carrier held not entitled to excuse its refusal to receive goods for transportation, and thereby escape the penalty imposed by Kirby's Dig. sec. 6803, by showing that an unusual emergency caused a shortage of cars.—St. Louis, I. M. & S. Ry. Co. v. State, Ark., 104 S. W. Rep. 1106.

38.——Knowledge of Lawful Rates.—A shipper is chargeable with knowledge of the lawful rate on his shipment, where it has been published and filed as required by law, and where

it is accessible to the public, unless he was misled after using proper diligence to ascertain such rate.—United States v. Standard Oil Co., U. S. D. C., N. D. Ill., 155 Fed. Rep. 305.

39.——Running Freight Trains on Sundays.—A carrier is not entitled to a deduction for intervening Sundays in the computation of an alleged unreasonable delay under Revisal 1905, sec. 2632, because section 2613 prohibits the running of freight trains between sunrise and sunset on Sunday.—Watson v. Atlantic Coast Line R. Co., N. C., 59 S. E. Rep. 55.

40.——Ticket Brokerage.—Injunction against ticket brokers unlawfully dealing in nontransferable, reduced-rate excursion tickets, may extend to restraining like dealings as to similar tickets which may be issued in the future.—Bitterman v. Louisville & N. R. Co., U. S. S. C., 28 Sup. Ct. Rep. 91.

41.——Transportation of Goods.—Where one of the two days next after the delivery of freight to a carrier was Sunday, such day was properly deducted in determining whether the freight was transported within a reasonable time under Revisal 1905, sec. 2632.—Davis & Hooks v. Atlantic Coast Line R. Co., N. C., 59 S. E. Rep. 53.

42. **Charities**—Care of Children.—In an action by a corporation whose business it is to care for minors without homes, for the support of minors having property held plaintiff could not collect.—Louisville Presbyterian Orphanage v. Chambers' Guardian, Ky., 104 S. W. Rep. 319.

43. **Chattel Mortgages**—Conversion.—An absolute sale to the exclusion of the rights of a mortgagee by a mortgagor who, under the terms of the mortgage, remains in possession of the chattels, works a conversion, for which the mortgagee may maintain trover without demand.—Ilfeld v. Ziegler, Colo., 91 Pac. Rep. 825.

44.——Crop to be Grown.—Where a mortgage was given on a crop planted at the date of the mortgage, but subsequently destroyed by natural causes and a new crop planted, the lien did not attach to the new crop.—Hall v. State, Ga., 59 S. E. Rep. 26.

45. **Composition of Creditor** — Election of Remedies.—Where one accepts money in settlement of a cause of action, he cannot thereafter set up the same cause of action against another whom he had the election of suing in the first instance.—McLendon Bros. v. Finch, Ga., 58 S. E. Rep. 690.

46. **Conspiracy**—Persons Liable.—Where a person joins a conspiracy already existing, he thereby becomes liable for any acts done or threats previously made by the conspirators in furtherance of the common design, but, to render him liable, the conspiracy must have been afoot when the acts were done or threats made.—Driggers v. United States, Ind. T., 104 S. W. Rep. 1166.

47. **Constitutional Law**—Construction by Legislature.—A contemporaneous construction given to a constitution by the legislature and acquiesced in by the people and the courts will not be disturbed unless plainly wrong.—State v. Harden, W. Va., 58 S. E. Rep. 715.

48.——Due Process of Law.—Due process of law is not afforded by a system of taxation prescribed by Georgia Political Code where valuation of property not returned for taxation made by the assessing officer, without notice, concludes the taxpayer.—Central of Georgia Ry. Co. v. Wright, U. S. S. C., 28 Sup. Ct. Rep. 47.

49.——Equal Protection of Law.—Assessing franchises and other property of corporations at a different rate and different method than those for other corporations for the same year, resulting in enormous disparity, denies due process of law.—Raymond v. Chicago Union Traction Co., U. S. S. C., 28 Sup. Ct. Rep. 7.

50.——Equal Protection of Laws.—Act Aug. 15, 1903, (Acts 1903, pp. 90, 91), making it illegal to procure money or other thing of value under contract for services with intent to defraud, is not in violation of the Constitution of the United States, as denying equal protection of the laws.—Vance v. State, Ga., 58 S. E. Rep. 690.

51.——Error to State Court.—Judgment of a state court not so enforcing a state statute as to deprive party complaining of rights in the federal constitution will not be reversed in the Supreme Court of the United States.—Lee v. State of New Jersey, U. S. S. C., 28 Sup. Ct. Rep. 22.

52.——Impairing Contract Obligation.—Contract obligations between association insuring on co-operative plan and its members held not unconstitutionally impaired by reorganization as a mutual level premium company, under Laws N. Y. 1901, p. 1779, c. 722.—Polk v. Mutual Reserve Fund Life Ass'n of New York, U. S. S. C., 28 Sup. Ct. Rep. 65.

53.——Regulation of Common Carriers.—Common carriers are not denied equal protection of the laws guaranteed by Const. U. S. Amend. 14, by Act, S. C. Feb. 23, 1903, p. 81, sec. 2, requiring them to pay claims for damages to intrastate shipment within 40 days under penalty.—Seaboard Air Line Ry. v. Seegers, U. S. S. C., 28 Sup. Ct. Rep. 28.

54.——Special Privileges.—Act March 6, 1907 (St. 1907, p. 122, c. 101), limiting use of water from artesian wells, held not to grant special privileges, in violation of Const. art. 1, sec. 21, because not limiting use of water pumped from subterranean sources.—Ex parte Elam, Cal., 91 Pac. Rep. 811.

55.——Suspension of Judge from Office.—Since such property right in an office as the holder has is qualified by all pre-existing valid laws, providing for its suspension or termination, the application of remedies so provided for does not unduly deprive him of any property.—Griner v. Thomas, Tex., 104 S. W. Rep. 1058.

56.——Taxation.—There is no contract between citizens and taxpayers of a municipal corporation and the corporation itself that the former shall be taxed only for the uses of that corporation, which is impaired by annexation under Act Pa. Feb. 7, 1906, secs. 1-9 (P. L. 7-11), to an adjoining and larger municipality.—Hunter v. City of Pittsburg, U. S. S. C., 28 Sup. Ct. Rep. 40.

57. **Contracts**—Sale of Patented Articles.—Exemption of merchants and dealers in patented articles from operation of Kirby's Ark. Dig. secs. 513-516, requiring note taken for a patented article to show for what it was given, held not repugnant to Const. U. S. Amend. 14, as denying equal protection of the laws.—Ozan Lumber Co. v. Union County Nat. Bank of Liberty, Ind., U. S. S. C., 28 Sup. Ct. Rep. 89.

58.——Statutory Requirements as to Public Contracts.—Invalidity of public contract because of non-compliance with requirement of Rev. St. U. S., sec. 3744 (U. S. Comp. St. 1901, p. 2510), that such contract should be reduced to writing, held immaterial after performance of

contract.—United States v. R. P. Andrews & Co., U. S. S. C., 28 Sup. Ct. Rep. 100.

59. **Copyright** — Publication. — Entering an original painting with the copyright reserved at exhibition of Royal Academy, whose by-laws prohibit copying, held not a publication defeating the right to take out a copyright.—American Tobacco Co. v. Werckmeister, U. S. S. C., 28 Sup. Ct. Rep. 72.

60. **Corporations**—Certificates of Incorporation.—A provision in a certificate of incorporation of a domestic corporation, as to the right of stockholders to inspect corporate books, held not to affect the power given to the courts by Corporation Act, sec. 44 (P. L. 1896, p. 292), to compel the production of corporate books for examination by a stockholder.—Hodgens v. United Copper Co., N. J., 67 Atl. Rep. 756.

61.——General Agency of Officer.—Where a corporation intrusts a principal officer with general supervision of a particular branch of its business, it clothes the officer with the authority of a general agent, which is not limited by private instructions.—American Car & Foundry Co. v. Alexandria Water Co., Pa., 67 Atl. Rep. 861.

62.——Mortgages.—Where the name of a corporation as chattel mortgagor, with its common seal, is affixed to the mortgage by one signing as treasurer of the corporation, the presumption is that he had authority to execute the instrument.—Nelson v. Spence, Ga., 58 S. E. Rep. 697.

63.——Service of Process.—Where, in an action against a domestic corporation, the process was not served on a proper person, the fact that the papers served were promptly transmitted to the person on whom service should have been made was insufficient to render the service valid.—State v. Myers, Mo., 104 S. W. Rep. 1146.

64.——Transfer of Stock.—Where plaintiff was the equitable owner of certain stock standing in the name of a corporation at the time the corporation's president transferred it to him, the court would give full effect to such transfer.—Graham v. Burgiss, S. Car., 59 S. E. Rep. 29.

65. **Costs**—Time for Application.—A motion to compel a nonresident plaintiff to give security for costs is a dilatory one, and where not made until the case had been taken up on the regular call of the docket is too late.—Wilkinson v. Cox, Ill., 81 N. E. Rep. 1020.

66. **Counties**—Allowance of Claims.—Facts necessary to give the county board of commissioners jurisdiction in the auditing and allowing of claims must appear on the record, and, if such facts do not appear, its judgment may be treated as a nullity wherever encountered.—State v. Goodwin, S. Car., 59 S. E. Rep. 35.

67. **Courts**—Jurisdiction.—Where one invokes the power of a court of general jurisdiction to obtain an injunction, he cannot thereafter be heard to say in avoidance of damages for injury resulting therefrom that the court had no jurisdiction.—Littleton v. Burgess, Wyo., 91 Pac. Rep. 832.

68.——Jurisdiction of Circuit Court of Appeals.—Circuit court of appeals, to which is addressed mandate of supreme court directing remand of cause to the district court for further proceedings, has no jurisdiction to compel district court by mandamus to modify the decree in supposed conformity with the mandate of the supreme court.—First Nat. Bank v. Chicago Title & Trust Co., U. S. S. C., 28 Sup. Ct. Rep. 23.

69.——Stare Decisis.—The doctrine of stare decisis, where it does not involve the rights of the citizen, should not be allowed to obstruct the carrying out of other provisions of the constitution intended to promote the progress, prosperity, and welfare of the people.—Collie v. Commissioners of Franklin County, N. Car., 59 S. E. Rep. 44.

70.——Stare Decisis.—Decisions affirming validity of legislation under which territorial bonds are issued in exchange for county bonds will be upheld as against a county on the doctrine of stare decisis after such bonds have gone into the channels of trade.—Vail v. Territory of Arizona, U. S. S. C., 28 Sup. Ct. Rep. 107.

71. **Covenants**—Dower Rights.—A widow's unassigned dower right in land sold by the husband's administrator to pay debts held a breach of the purchaser's covenant against incumbrances in a deed conveying the land to plaintiff.—Fishel v. Browning, N. Car., 58 S. E. Rep. 759.

72. **Criminal Evidence**—Admissibility.—Return of an officer on a subpoena that the witness was dead prima facie establishes that fact rendering admissible the testimony of the witness before the commissioner before whom the examining trial was had.—Driggers v. United States, Ind. T., 104 S. W. Rep. 1166.

73.——Admissibility.—Testimony by a maker of a note that he had paid it in full, and that it had been delivered up to him by the holder, is admissible without the production of the note.—Taylor v. State, Ga., 59 S. E. Rep. 12.

74.——Credibility of Accomplice.—In a criminal prosecution, held a jury may convict upon the uncorroborated testimony of an accomplice if they are satisfied beyond a reasonable doubt that it is true.—State v. Stewart, Del., 67 Atl. Rep. 786.

75.——Evidence to Aid Court in Exercise of Discretion.—Where it rests in the discretion of the court to fix the punishment for a criminal offense, although not admissible on the issue of subpoena and examine witnesses or take into consideration other evidence as to matters which may be in aggravation or mitigation of the offense, although not admissible on the issue of guilt or innocence.—United States v. Standard Oil Co., U. S. D. C., N. D. Ill., 155 Fed. Rep. 305.

76.——Hearsay.—Testimony of a witness on a trial for murder as to conduct and threats which he saw and heard was not subject to objection that it was hearsay.—Driggers v. United States, Ind. T., 104 S. W. Rep. 1166.

77. **Criminal Trial**—Character Witnesses.—In a criminal trial, the court may fix a reasonable limit upon the number of character witnesses, and it was not error in a manslaughter trial to limit the number to five for each side.—Commonwealth v. Thomas, Ky., 104 S. W. Rep. 326.

78.——Conduct of Audience.—Applause of audience at the trial held not open to complaint, in view of the court's immediate action and statement to the jury.—State v. Harrison, N. Car., 58 S. E. Rep. 754.

79.——Continuance of Case.—In the absence of a rule of court or an act of assembly, the court is not bound to follow a custom of continuing without cause a criminal case returned within 10 days from the beginning of the term.—Commonwealth v. Delero, Pa., 67 Atl. Rep. 764.

80.——Locality of Offense.—Where deceased was shot in one state and died in another, the crime was committed in the state where the shooting occurred, and the courts of that state

have jurisdiction.—Commonwealth v. Ball, Ky., 104 S. W. Rep. 325.

81. **Damages**—Effect of Accepting Salary During Disability.—Plaintiff held not barred from recovering for lost time because of injuries sustained through defendant's negligence for the reason that plaintiff's employer continued to pay his regular wages as a gratuity while plaintiff was unable to work.—Gulf, W. T. & P. Ry. Co. v. Wittnebert, Tex., 104 S. W. Rep. 424.

82. **Dedication**—Streets.—Where a street was dedicated for ordinary street purposes, it would be presumed that it was intended to be used for a carriage way in the center with walks on the side.—City of Georgetown v. Hambrick, Ky., 104 S. W. Rep. 997.

83. **Equity**—Multifariousness.—Objection of multifariousness for misjoinder of parties and causes of action held not to lie against bill to enjoin ticket brokers from dealing in nontransferable excursion tickets, where the acts complained of as to each defendant were of a like character.—Bitterman v. Louisville & N. R. Co., U. S. S. C., 28 Sup. Ct. Rep. 91.

84. **Evidence**—Declarations.—Declarations of a husband included in letters while in possession of the land jointly deeded to himself and wife may be admissible in evidence, when explanatory of the possession, though it is not clearly shown whether the letters were received. —Hubbard v. Cheney, Kan., 91 Pac. Rep. 793.

85.——Presumption.—In the absence of the record of an adverse suit, there is no presumption that subterranean rights under lode mining locations were therein determined.—Lawson v. United States Min. Co., U. S. S. C., 28 Sup. Ct. Rep. 15.

86. **Exchange of Property**—Rights of Parties as to Each Other.—The fact that an agreement between the grantees under a certain contract as to a division of the property between themselves was not in writing held not to release the grantor from his obligation to convey.—McKennan v. Mickelberry, Ill., 81 N. E. Rep. 1072.

87. **Exceptions, Bill of**—Essential Parties.—Where essential parties to a bill of exceptions are neither named nor designated as such in the bill presented to the trial judge, such bill of exceptions is fatally defective for want of proper parties.—Sistrunk v. Pendleton, Ga., 58 S. E. Rep. 712.

88. **Executors and Administrators**—Contract for Division of Attorney's Fees.—The estate of an attorney who agreed to divide net fees received in prosecution of French spoliation claims held liable to account for fees received for services performed by his administrator.—Earle v. Myers, U. S. S. C., 28 Sup. Ct. Rep. 86.

89. **Exemptions**—Evasion of Exemption Laws. —A creditor, resident in this state, may be enjoined from prosecuting an action in another state for the purpose of evading the exemption provided for by the constitution and general exemption laws, and by Code, sec. 493 (Revisal 1905, sec. 678).—Wierse v. Thomas, N. Car., 59 S. E. Rep. 58.

90. **Federal Courts**—Decision on Non-Federal Grounds.—No federal question as to due process of law or full faith and credit which will sustain writ of error from the federal supreme court to the highest court of a state is involved in a suit where a state court reversed judgment because of effect of a judgment of a federal circuit court pleaded as res judicata.—Leathe v. Thomas, U. S. S. C., 28 Sup. Ct. Rep. 30.

91.——Error to Porto Rico Supreme Court.—Federal question presented by contention that changes made by Porto Rico legislation in judicial districts and to the number of judges deprived the courts of their validity under Act April 12, 1900, c. 191, sec. 33, 31 Stat. 85, held too frivolous to sustain a writ of error to Supreme Court of Porto Rico under section 35, when section 33 is considered in connection with section 15, giving power to alter and modify or repeal.—Kent v. People of Porto Rico, U. S. S. C., 28 Sup. Ct. Rep. 55.

92.——Federal Questions.—Objection that federal question was not seasonably raised in state court held not available to defeat jurisdiction of Supreme Court of the United States on writ of error to the highest court of a state.—Chambers v. Baltimore & O. R. Co., U. S. S. C., 28 Sup. Ct. Rep. 34.

93.——Questions Reviewable.—A federal question outside the record and not connected with any federal question raised thereby cannot be considered on writ of error to a state court.—Hunter v. City of Pittsburg, U. S. S. C., 28 Sup. Ct. Rep. 40.

94. **Guaranty**—Notice of Protest.—Where indorsers waived notice of a protest on a note, the guarantors were not discharged from liability because of the holder's failure to charge the indorsers at the date the note fell due.—Spier v. McNaught, 105 N. Y. Supp. 1060.

95. **Habeas Corpus**—Custody of Children.—The statute does not confer upon the court in habeas corpus proceedings the right to settle the permanent custody of infant children, such right belonging to the chancellor as parens patriae by virtue of the equity powers of the court of chancery.—Morris v. Wardell, N. J., 67 Atl. Rep. 850.

96.——Extradition Proceedings.—Prima facie case arising on habeas corpus from an extradition warrant charging larceny held not rebutted by affidavit that accused was in another state during the afternoon of the day on which the larceny was committed.—People of State of Illinois v. Pease, U. S. S. C., 28 Sup. Ct. Rep. 58.

97. **Husband and Wife**—Contracts of Wife.—At common law a confession of judgment on a warrant of attorney executed by a married woman is void as to her and may be attacked either directly or collaterally. — Forsyth v. Barnes, Ill., 81 N. E. Rep. 1028.

98. **Injunction**—Jurisdiction. — Where two persons are contesting in the land department, a right to land, and each is in possession of a portion, the district court cannot by mandatory injunction take the land from contestants and give it to the other.—Brown v. Donnelly, Okl., 91 Pac. Rep. 859.

99. **Insane Persons**—Costs of Inquisition.—One who, after suing out a commission of lunacy, voluntarily dismisses the proceeding, is not compelled to pay the cost therein as condition precedent to instituting a second similar proceeding.—Hinton v. Brewer, Ga., 58 S. E. Rep. 708.

100. **Wills**—Execution.—If the propounder shows that it is the signature of the testator, who was competent to read and write, and the execution of the will, it would carry the burden of proof so far as his knowing the contents of the will was concerned.—Brown v. McBride, Ga., 58 S. E. Rep. 702.